



How to Safely and Legally Hire Independent Contractors

By Attorney Stephen Fishman

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Part I: Benefits and Drawbacks of Using Independent Contractors

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Part I: Benefits and Drawbacks of Using Independent Contractors

A majority of all businesses routinely use the services of non-employees, whether they are called consultants, independent contractors, vendors or nothing at all. For convenience, these people will be referred to here as independent contractors, or “ICs” for short.

A hiring firm that classifies workers as independent contractors reaps many financial and other benefits. But there are some significant drawbacks to using ICs as well. Let’s look at these issues in detail.

A. Benefits of Using Independent Contractors

It’s probably safe to say that the main reason most businesses use independent contractors is to save money. Consider the following expenses (in addition to a salary) and paperwork that are incurred by a business that hires an employee instead of an independent contractor:

- **Federal tax withholding.** The employer must withhold federal income tax from the wages paid to an employee and pay them to the IRS. Each year, the employer must send the employee a Form W-2 showing how much he or she earned and how much was withheld.
- **Social Security and Medicare taxes.** Social Security and Medicare taxes are levied on both the employer and employee and must be paid together with the withheld federal income tax.
- **Federal unemployment taxes.** Employers must pay federal unemployment taxes.
- **State taxes.** Employers must also pay state unemployment taxes and, in most states, withhold state income taxes from employees’ paychecks.

- **Workers’ compensation insurance.** Employers must usually provide workers’ compensation insurance coverage for employees in case they become injured on the job.
- **Employment benefits.** Although not legally required, most employers give their employees health insurance, sick leave, paid holidays and vacations. More generous employers also provide pension benefits for their employees.
- **Office space and equipment.** An employer normally provides an employee with office space and whatever equipment he or she needs to do the job.

All of these items add enormously to the cost of hiring and keeping an employee. Typically, more than one-third of all employee payroll costs go for Social Security, unemployment insurance, health benefits and vacation.

By hiring an independent contractor instead of an employee, a business incurs none of these obligations. It need not withhold or pay any taxes. Perhaps most importantly, an employer does not have to provide an independent contractor with health insurance, a pension plan or any other employee benefits. Although such benefits are not legally required, most employees demand them.

A business that hires an IC need only report amounts paid to an independent contractor by filing a Form 1099-MISC with the IRS. Even this form need not be filed if an IC is incorporated or paid less than \$600 in a calendar year.

There is another important reason businesses often prefer to use independent contractors: They avoid making a long-term commitment to the worker. An independent contractor can be hired solely to accomplish a specific task, enabling a business to obtain specialized expertise only for a short time. The hiring firm need not go through the trauma, severance costs and potential lawsuits brought on by laying off or firing an employee.

B. Drawbacks and Risks of Using Independent Contractors

You might now be thinking, “I’ll never hire an employee again; I’ll just use independent contractors.” Before doing this, you should know that there are some substantial drawbacks and risks involved in using independent contractors.

1. Advantages of Hiring Employees

Even though there are many financial benefits to using ICs rather than employees, companies continue to hire employees. There are many good reasons for this—for example:

- When you hire an employee, you can provide him or her with detailed training on how to do the job just how you want it done. You can then closely supervise and otherwise control the way the employee performs on the job. This is something you can’t do with an IC. Instead, ICs must be left alone to perform the agreed upon services without substantial help or interference from you. (See Section B, below.)
- Employees ordinarily will not be working for your competitors while they’re working for you. In contrast, an IC you hire today may go to work for a competitor tomorrow.
- When you hire employees, you can depend on having the same workers available day after day. Although it may not be as true today as it once was, employees who are well treated can generally be relied upon to stick around for a while. In contrast, ICs have no loyalty to anyone but themselves and their own bottom line. Having workers constantly coming and going can be inconvenient and disruptive. And the quality of work you get from various different ICs may be uneven.

2. Risks of Hiring ICs

Another reason businesses continue to hire employees is fear of the IRS and other government agencies. The IRS and most states want to see as many workers as possible classified as employees, not independent contractors. This way, the IRS and states can immediately collect taxes based on automatic and involuntary payroll withholding, rather than waiting for ICs to voluntarily pay estimated taxes four times a year.

Because no taxes are deducted from their pay, ICs have many more opportunities to evade taxes than do employees. Moreover, substantial numbers of ICs habitually underreport their income to the IRS. This is something an employee simply can’t do, since employers must report all employee payments to the IRS on IRS form W-2. In short, the government gets more tax money when workers are treated as employees rather than as ICs.

In recent years, the IRS has mounted an aggressive attack on employers who, in its view, misclassify employees as independent contractors. If the IRS concludes that an employer has misclassified an employee as an independent contractor, it may impose substantial assessments, penalties and interest. Being ordered to pay massive amounts of back taxes and penalties can easily put a small company out of business.

An employer’s woes do not necessarily end with the IRS. If the state version of the IRS or the state unemployment or workers’ compensation agencies suspect that workers have been misclassified as ICs, they may also audit the employer and order that it pay back taxes or unemployment or workers’ compensation insurance.



If you follow the instructions in this kit for hiring independent contractors (see Part II, below) and for creating an independent contractor agreement (see parts III and IV, below), you will be on relatively safe ground should the IRS ever decide to audit you.

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Part II: Procedures for Hiring Independent Contractors

Assume that sooner or later you will be audited by the IRS and other government agencies and the status of workers you've classified as ICs will be questioned. Long before you're audited, you should have in your files all the information and documentation you need to prove that a worker is an IC. Don't wait until you're audited to start thinking about how to prove a worker is an IC; by then it may be too late.

Someone in your company should be in charge of:

- interviewing prospective ICs
- determining whether applicants qualify as ICs
- authorizing workers to be hired as ICs, and
- preparing an IC data file containing the information and documentation you'll need to prove the worker is an IC if you're audited.

This individual, who may be called a Contract Administrator, should be fully trained regarding the laws and rules used to determine a worker's status. If you're running a one-person business, this person is you.

A. Interviewing Prospective ICs

All prospective ICs should fill out the Independent Contractor Questionnaire contained in the Appendix and provide the required documentation. Do not have an IC fill out an employment application; this makes the worker look like an employee.

The Contract Administrator should review the Questionnaire and documentation with the IC during an initial interview.

QUESTIONS YOU SHOULDN'T ASK

Federal and state laws bar employers from asking certain types of questions in interviews or on employment applications. It's wise to also follow these rules when you interview ICs. For example, the Americans with Disabilities Act prohibits pre-employment questions about a disability. In addition, the Civil Rights Act forbids you to ask about an applicant's race, marital status, height, weight, gender, birthplace or national origin. There are also restrictions concerning questions about an applicant's age, arrest record, citizenship and affiliations. For detailed information, see *The Employer's Legal Handbook*, by Fred Steingold (Nolo).

B. Obtaining Necessary Documents from ICs

Ask any worker you plan to hire as an IC to provide the following documentation:

- copies of the IC's business license if required and any professional licenses the IC has, such as a contractor's license
- certificates showing that the IC has insurance, including general liability insurance and workers' compensation insurance if the IC has employees
- the IC's business cards and stationery
- copies of any advertising the IC has done, such as a Yellow Pages listing
- a copy of the IC's White Pages business phone listing, if there is one
- if the IC is operating under an assumed name, a copy of the fictitious business name statement
- the IC's invoice form to be used for billing purposes

- a copy of any office lease and a photograph of the IC's office or workplace
- the IC's unemployment insurance number issued by the state unemployment insurance agency (only ICs with employees will have these)
- copies of IRS Form 1099 issued to the IC from other companies for which the IC has worked
- the names and salaries of all assistants that the IC will use on the job
- the names and salaries of all assistants the IC has used on previous jobs for the past two years and proof that the IC has paid them, such as copies of canceled checks or copies of payroll tax forms
- a list of all the equipment and materials the IC will use in performing the services and how much it costs (proof that the IC has paid for the equipment, such as copies of canceled checks, is very helpful)
- the names and addresses of other clients or customers for whom the IC has performed services during the previous two years (but don't ask for the identities of any clients the IC is required to keep confidential), and
- if the IC is a sole proprietor and will agree to do so, copies of the IC's tax returns for the previous two years showing that the IC has filed a Schedule C, Profit or Loss From a Business, (this will show that the IC has been operating an independent business).



Most ICs will not provide you with every single document that we've listed above.

Although you shouldn't fret too much if you can't get every document on the list, you should try to get as many of the documents as possible. The more evidence that you have that the IC is a separate business, the better.

THE IMPORTANCE OF INDEPENDENT CONTRACTOR'S FORM OF BUSINESS

How an IC's business is legally organized plays an important role in avoiding and winning IRS and other government audits. You'll have the most trouble proving that workers who are sole proprietors are independent contractors. Unfortunately, that is the way the vast majority of ICs do business.

From your point of view, by far the best form of legal organization for an IC is a corporation. Don't take an IC's word that he or she is incorporated. Obtain a copy of the articles of incorporation—a document that must be filed with the Secretary of State or similar official in the state where the corporation is organized as proof that the corporation exists. Also, call the Secretary of State's office to make sure that the corporation is in good standing—that is, not dissolved or defunct.

C. Determining Whether Workers Qualify as ICs

The Contract Administrator must examine the answers the worker provided on the Independent Contractor Questionnaire, the documentation and the task the IC is being hired to perform to see if the worker can qualify as an IC.

This can be difficult because there is no single definition of an IC. Mechanical rules won't work. For example, some firms will hire any worker as an IC so long as he or she is incorporated and works no longer than six months for the firm. While both these factors are very helpful, they are no guarantee that the worker will not be reclassified as an employee by government auditors. All the facts and circumstances must be examined and weighed on a case-by-case basis.

Given the risks involved in misclassifying an employee as an independent contractor, it is important to clearly understand whether a worker qualifies as an independent contractor or should be treated as an employee. Stated simply, an independent contractor is a person who is in business for himself or herself. Anyone with an independent business qualifies.

To decide whether a worker is an independent businessperson or a mere employee, the IRS and courts assess the degree of control the hiring party has over the worker. An independent contractor maintains personal control over the way he or she does the work contracted for, including details of when, where and how the work is done. The hiring party's control is limited to accepting or rejecting the final result of the independent contractor's work. An independent contractor is just that—independent.

If the person or company that hires a worker has the right to control the worker, that worker is an employee. This is so whether or not that right was actually exercised—that is, whether the worker was really controlled. If the right of control is present, the IRS will view the worker as an employee, even if you have a written agreement calling him or her an independent consultant, independent contractor, partner or co-venturer.



Part-time workers can be employees.

If the right to control the worker exists, it also makes no difference whether a person only works part time. Even a part-time worker will be considered an employee if he or she is not operating an independent business.

Government auditors examine a number of different factors to determine whether a hiring firm has the right to control a worker. Different agencies use different sets of factors. The IRS looks at 14 main factors. Other agencies examine 11 factors, others only three. (See the Worker Classification Factors chart in the Appendix.) The following list includes virtually every factor any auditor might consider.

As you look down this list, don't be overwhelmed—you don't need to memorize it, and it's not necessary to satisfy every factor for a worker to be considered an IC. How much is enough? The best answer we can give you is that the factors considered by the agency involved—be it the IRS, state unemployment compensation agency or other agency—must weigh in favor of IC status. Obviously, the more factors that indicate IC status, the better off you'll be if you're audited.



For a comprehensive agency-by-agency examination of how worker status is determined, see *Hiring Independent Contractors*, by Stephen Fishman (Nolo).

1. Making a Profit or Loss

Employees. Employees are typically paid for their time and labor and have no liability for business expenses.

Independent Contractors. ICs can earn a profit or suffer a loss as a result of the services they provide. ICs are entrepreneurs. They make money if their businesses succeed, but risk going broke if they fail. Whether ICs make money depends on how well they use their ingenuity, initiative and judgment in conducting their business.

Generally speaking, hiring firms do not pay the business expenses of ICs. This means that they don't pay for things such as meals, mileage, equipment, materials and office rent. Those are the sort of things that companies provide to employees, not ICs.

EXAMPLE: Jack retires from his job as an actuary for a large insurance company and decides to become a professional golfer. He purchases \$2,000 worth of golf clubs and qualifies for the Senior PGA Golf Tour. He pays his own traveling expenses and entrance fees for tournaments. If Jack plays well, he will win prize money and may earn a profit from his golfing. But if he plays poorly, he may earn nothing and lose money. How much money Jack makes or loses is entirely up to him. Jack is an IC, and proud of it!

2. Working on Specific Premises

Employees. Employees must work where their employers tell them, usually on the employer's premises.

Independent Contractors. ICs are usually able to choose where to perform their services.

Work at a location specified by a hiring firm implies control by the firm, especially where the work could be done elsewhere. A person working at a hiring firm's place of business is physically within the firm's direction and supervision. If the person can choose to work off the premises, the firm obviously has less control.

However, many ICs perform tasks that can only be done at the hiring firm's premises—for example, an IC painter or rug layer must perform the services on the client's premises. In this event, this factor is not considered in determining the worker's status.

3. Offering Services to the General Public

Employees. Employees offer their services solely to their employers.

Independent Contractors. ICs offer services to the general public.

Since they are independent business people, ICs normally make their services available to the public. ICs often advertise and will work for anyone who agrees to their terms.

4. Right to Fire

Employees. An employee typically can be discharged by the employer at any time, and for almost any reason.

Independent Contractors. An IC's relationship with a hiring firm can be terminated only according to the terms of their agreement.

If you have a right to fire a worker at any time for any reason or for no reason at all, government auditors may conclude that you have the right to control that worker. The ever-present threat of dismissal must inevitably cause a worker to follow your instructions and otherwise do your bidding. On the other hand, this type of control is not present when both you and the IC know you can't arbitrarily terminate the IC's services without risking a lawsuit for breach of contract (that is, breach of the independent contractor agreement).

5. Furnishing Tools and Materials

Employees. Employees are typically furnished all the tools and materials necessary to do their jobs by their employers.

Independent Contractors. ICs typically furnish their own tools and materials.

The fact that a hiring firm furnishes tools and materials, such as computers and construction equipment, tends to show control because the firm can determine which tools the worker is to use and, at least to some extent, how the worker will use them.

Sometimes, however, ICs have to use a hiring firm's tools or materials. For example, a computer consultant may have to perform work on the hiring firm's computers. The fact that the tools are provided in such a situation should be irrelevant.

6. Method of Payment

Employees. Employees are usually paid by unit of time.

Independent Contractors. ICs are typically paid a flat rate for a project.

Workers who are paid by unit of time—for example, by the hour, week or month—are apt to be classed as employees. This is because the hiring firm assumes the risk that the services provided will be worth what the worker is paid. To protect its investment, the hiring firm demands the right to direct and control the worker's performance. In this way, the hiring firm makes sure it gets a day's work for a day's pay.

Payment by the job or on a straight commission generally indicates that the worker is an IC. However, in many professions and trades, payment is customarily made by unit of time. For example, lawyers, accountants and psychiatrists typically charge by the hour. Where this is the general practice, the method of payment factor will not be given great weight.

7. Working for More Than One Firm

Employees. Although employees can have more than one job at a time, employers can require loyalty and prevent employees from taking some alternative jobs.

Independent Contractors. ICs usually have multiple clients or customers.

Many employees have more than one job at a time. However, employees owe a duty of loyalty toward their employers—that is, employees cannot engage in activities that harm or disrupt the employer's business. This restricts employees' outside activities. For example, an employee ordinarily wouldn't be permitted to take a second job with a competitor of the first employer. An employee who did so would be subject to dismissal.

ICs are generally subject to no such restrictions. They can work for as many clients or customers as they want. Having more than one client or customer at a time is very strong evidence of IC status. People who work for several firms at the same time are generally ICs because they're usually free from control by any one of the firms.

8. Continuing Relationship

Employees. Employees have a continuing relationship with their employers.

Independent Contractors. ICs generally work on one project and then move on.

Although employees can be hired for short-term projects, this type of relationship is more typical of ICs. An employee typically works for the same employer month after month, year after year, sometimes decade after decade. Such a continuing relationship is one of the hallmarks of employment. Indeed, one of the main reasons businesses hire employees is to have workers available on a long-term basis.

9. Investment in Equipment or Facilities

Employees. Employees generally have no investment in equipment or facilities. Usually, the employer invests in those sorts of things.

Independent Contractors. ICs have an investment in the equipment and facilities appropriate for their businesses.

This factor includes equipment and premises necessary for the work, such as office space, furniture and machinery. It does not include tools, instruments and clothing commonly provided by employees in their trade—for example, uniforms that are commonly provided by the employees themselves. Nor does it include education, experience or training.

When a worker has made a significant investment in equipment and facilities he needs to perform his services, he has a good argument for being considered an IC. By making such a financial investment, the worker risks losing it if the business is not profitable. Also, the worker is not dependent upon a hiring firm for the tools and facilities needed to do the work. Owning the tools and facilities also implies that the worker has the right to control their use.

On the other hand, lack of investment indicates dependence on the hiring firm for tools and facilities and is another hallmark of an employer-employee relationship.

Some types of employees typically provide their own inexpensive tools. For example, carpenters employed by a contractor may use their own hammers, and accountants in an accountancy firm may provide their own calculators. Providing such inexpensive tools doesn't show that a worker who is otherwise an employee is an IC instead. But a worker who provides his or her own \$3,000 computer or \$10,000 lathe is more likely to be an IC.

10. Business or Traveling Expenses

Employees. Employees' job-related business and traveling expenses are paid by the employer.

Independent Contractors. ICs typically pay their own business and traveling expenses.

If the hiring firm pays a worker's business and traveling expenses, the worker will often be viewed as an employee. To be able to control such expenses, the employer must retain the right to regulate and direct the worker's actions.

On the other hand, a person who is paid per project and who has to pay expenses out-of-pocket is generally an IC. Any worker who is accountable only to himself or herself for expenses is free to work according to individual methods and means—the hallmark of an IC.

Of course, some ICs typically bill their clients for certain expenses. For example, accountants normally bill clients for travel, photocopying and other incidental expenses. This does not in itself make them employees, since their clients do not control them.

11. Right to Quit

Employees. An employee may normally quit the job at any time without incurring any liability to the employer.

Independent Contractors. An IC is legally obligated to complete the work he or she agreed to do.

Employees normally work "at will." They can quit whenever they want to without incurring liability, even if it costs the employer substantial money and inconvenience. And, conversely, they can be fired at will.

ICs are legally obligated to complete the job they signed on to do. If they don't, they are liable to the hiring firm for any losses caused by their stoppage.

EXAMPLE: The Lazy Eight Motel hires John, a licensed building contractor, to construct a new wing. John agrees to complete the work by May 1. Halfway through construction, John receives a much more lucrative offer to work on a new office building project. John stops work and abandons the project. Lazy Eight is forced to hire a new contractor to complete the wing. As a result, completion of the wing is delayed by several months. John is liable to Lazy Eight for the revenue it lost due to his failure to complete the wing as agreed.

12. Instructions

Employees. Employers have the right to give their employees oral or written instructions that the employees must obey concerning when, where and how they are to work.

Independent Contractors. ICs need not comply with instructions on how to perform their services; they decide on their own how to do their work. They are, however, obliged to deliver the final product as called for in the agreement or contract.

Watch out—this matter of “instructions” can be tricky. That’s because there is no requirement that instructions actually be *given* to a worker to make her an employee. The IRS and other government agencies will focus instead on whether you have the *right* to give them. Even though you have not given a worker instructions, the IRS could conclude that you have set up the relationship so that you have the right to do so. They may view this power to instruct as an indication of employment status.

Fortunately, in many situations the issue of instructions won’t be problematic for IC status. If a worker is running an independent business and you are just one client or customer among many, it’s likely you don’t have the right to give the worker instructions about how to perform the ser-

vices. Your right is usually limited to accepting or rejecting the final results.

EXAMPLE: The local Acme Burger has a plumbing problem. The manager looks in the Yellow Pages and calls Jake the plumber to come and fix the problem. Jake shows up with his assistant Tony. The manager explains the problem and Jake gives him an estimate of how much it will cost to fix it. The manager gives the go ahead and Jake and Tony begin work. When the work is finished, the manager can refuse to pay if he thinks the plumbing has not been properly repaired. However, if he had presumed to tell Jake how to go about doing the plumbing repair, Jake would probably have told him to get lost and gone on to his next customer.

On the other hand, you probably will have the right to give instructions to workers who are not running an independent business and are largely or solely dependent upon you for their livelihood.

EXAMPLE: Joe the tailor abandons his own tailor shop when he’s hired to perform full-time tailoring services for Acme Suits, a large haberdashery chain. Joe is completely dependent upon Acme for his livelihood. Acme managers undoubtedly have the right to give Joe instructions, even if they don’t feel the need to do so because Joe is such a good tailor.

Note that you may give a worker detailed guidelines as to the end results to achieve without destroying his status as an IC. For example, a software programmer may be given highly detailed specifications describing the software programs to develop; or a building contractor may be given detailed blueprints showing precisely what the finished building should look like. Since these relate only to the end results to be achieved, not how to achieve them, they do not turn the programmer or building contractor into employees.

13. Sequence of Work

Employees. Employees may be required to perform services in the order or sequence set for them by the employer.

Independent Contractors. ICs decide for themselves the order or sequence in which they work.

This factor is closely related to the right to give instructions. If a person must perform services in the order or sequence set by the hiring firm, it shows that the worker is not free to use discretion in working, but must follow established routines and schedules.

Often, because of the nature of the occupation, the hiring firm either does not set the order of the services or sets them infrequently. It is sufficient to show control, however, if the hiring firm retains the *right* to do so. For example, a salesperson who works on commission is usually permitted latitude in mapping out work activities. But one who hires such a salesperson normally has the discretion to require him or her to report to the office at specified times, follow up on leads and perform certain tasks at certain times. Such requirements can interfere with and take precedence over the salesperson's own routines or plans. They indicate control by the hiring firm and employee status for the salesperson.

14. Training

Employees. Employees may receive training from their employers.

Independent Contractors. ICs ordinarily receive no training from those who purchase their services.

Training may be done by teaming a new worker with a more experienced one, by requiring attendance at meetings or seminars or even by correspondence. Training shows control because it indicates that the employer wants the services performed a particular way. This is espe-

cially true if the training is given periodically or at frequent intervals.

ICs are usually hired precisely because they don't need any training. They possess special skills or proficiencies that the hiring firm's employees do not have.

15. Services Performed Personally

Employees. Employees are required to perform their services on their own—that is, they can't get someone else to do their jobs for them.

Independent Contractors. ICs generally are not required to render services personally; for example, they can have their own employees to do all or part of the work.

Ordinarily, when you hire an IC, he or she doesn't have to do all the work personally. This is part and parcel of running a business. For example, if you hire an accountant to prepare your tax return, the accountant normally has the right to have employee assistants do all or part the work under his or her supervision—a process known as delegation.

Generally, requiring someone whom you hire to personally perform all the work indicates that you want to control how the work is done, not just the end results. If you were just interested in end results, you wouldn't care who did the work; you'd just make sure the work was done right when it was finished. However, the law of contracts imposes significant restrictions on an IC's ability to delegate work that involves personal services—for example, painting a picture or creating another work of art.

16. Hiring Assistants

Employees. Employees hire, supervise and pay assistants only at the direction of the employer.

Independent Contractors. ICs hire, supervise and pay their own assistants.

Government auditors will usually be very impressed by the fact that a worker hires and pays his or her own assistants. This is something employees simply do not do, and it is strong evidence of IC status because it shows risk of loss if the IC's income does not match payroll expenses.

17. Set Working Hours

Employees. Employees ordinarily have set hours of work.

Independent Contractors. ICs are masters of their own time; they ordinarily set their own work hours.

Obviously, telling a worker when to come to work and when to leave shows that you have control over that worker.

18. Working Full Time

Employees. An employee may be required to devote full time to the employer's business.

Independent Contractors. ICs are free to work when and for whom they choose.

Requiring a worker to devote full time to the workplace indicates that you have control over how much time he or she spends on your job. In practice, it restricts that worker from working elsewhere.

19. Oral or Written Reports

Employees. Employees may be required to submit regular oral or written reports to the employer regarding the progress of their work.

Independent Contractors. ICs are generally not required to submit regular reports; they are responsible only for end results.

Submitting reports shows that the worker is compelled to account for individual actions. Reports are an important control device for an employer. They help determine whether directions are being followed, or whether new instructions should be issued.

This factor focuses on regular reports detailing a worker's day-to-day performance. It does not include the common practice among ICs to submit infrequent interim reports to hiring firms when they are working on long or complex projects. These reports are typically tied to specific completion dates, timelines or milestones written into the contract. For example, a building contractor may be contractually required to report to the hiring firm when each phase of a complex building project is completed. Submission of a report like this will not in itself make the contractor into an employee in the eyes of the government.

20. Integration into Business

Employees. Employees typically provide services that are an integral part of the employer's day-to-day operations.

Independent Contractors. ICs' services typically are not part of the hiring firm's day-to-day business operation.

Integration in this context has nothing to do with race relations. It simply means that the workers are a regular part of the hiring firm's overall operations. According to most government auditors, the hiring firm would likely exercise control over such workers because they are so important to the success of the business.

EXAMPLE: Fry King is a fast food outlet. It employs 15 workers per shift who prepare and sell the food. Jean is one of the workers on the night shift. Her job is to prepare all the french fries for the shift. Fry King would likely go out of business if it didn't have

someone to prepare the french fries. Since french fry preparation is a regular or integral part of Fry King's daily business operations, Jean's work is that of an employee.

By contrast, ICs generally have special skills that the hiring firm calls upon only sporadically.

EXAMPLE: Over the course of a year, Fry King hires a painter to paint its business premises, a lawyer to handle a lawsuit by a customer who suffered from food poisoning and an accountant to prepare a tax return. All of these things may be important or even essential to Fry King—otherwise it wouldn't have them done—but they are not a part of Fry King's normal overall daily operations of selling fast food.

21. Skill Required

Employees. Workers whose jobs require a low level of skill and experience are more likely to be employees.

Independent Contractors. Workers with jobs requiring high skills are more likely to be ICs.

The skill required to do a job is a good indicator of whether the hiring firm has the right to control a worker. This is because you are far more likely to have control over the way low-skill workers do their jobs than you do over the way high-skill workers do their jobs. For example, if you hire a highly skilled repair person to maintain an expensive and complex photocopier, it's doubtful that you know enough about photocopiers to supervise the work or even tell the repair person what to do. All you are able to know is whether the repair person's results meet your requirements—that is, whether the photocopier works or not.

But when you hire a person to do a job that does not require high skills or training, such as answering telephones or cleaning offices, you are normally well qualified to supervise the work and give step-by-step directions. Workers in such occupations generally expect to be controlled by the person who pays them—that is, they expect to be given specific instructions as to how to work, to be required to work during set hours and to be provided with tools and equipment.

For these reasons, highly skilled workers are far more likely to be ICs than low-skill workers. But having an advanced professional degree or possessing unique skills does not *in itself* make that person an IC. The question of control must always be addressed. Corporate officers, doctors and lawyers can be employees just like janitors and other manual laborers if they are subject to a hiring firm's control.

EXAMPLE: Dr. Welby leaves his lucrative solo medical practice to take a salaried position teaching medicine at the local medical school. When Welby ran his own practice he was clearly an IC in business for himself. He paid all the expenses for his medical practice and collected all the fees. If the expenses exceeded the fees, he lost money.

As soon as Welby took the teaching job, he became an employee of the medical school. The school pays him a regular salary and provides him with employee benefits, so he has no risk of loss as he did when he was in private practice. The school also has the right to exercise control over Smith's work activities—for example, requiring him to teach certain classes. It also supplies an office and all the equipment Welby needs. He is clearly no longer in business for himself.

22. Worker Benefits

Employees. Employees usually receive benefits such as health insurance, sick leave, pension benefits and paid vacation.

Independent Contractors. ICs ordinarily receive no similar workplace benefits.

If you provide a worker with employee benefits such as health insurance, sick leave, pension benefits and paid vacation, it's only logical for courts and government agencies to assume that you consider the worker to be your employee subject to your control. To keep the benefits, it's likely that the worker would obey your orders. You'll have a very hard time convincing anyone that a person you provide with employee benefits is not your employee.

On the other hand, you are not typically required to provide an IC with any benefits other than payment for completing the work.

23. Tax Treatment of the Worker

Employees. Employees usually have federal and state payroll taxes withheld by their employers and remitted to the government.

Independent Contractors. ICs ordinarily pay their own taxes.

Employers must ordinarily withhold and pay federal and state payroll taxes for their employees, including Social Security taxes and federal income taxes. A firm that hires an IC ordinarily need not remit or withhold any taxes for the worker.

Treating a worker as an employee for tax purposes—that is, remitting federal and state payroll taxes for the worker—is very strong evidence that you believe the worker to be your employee and you have the right to exercise control over him or

her. Indeed, one court has ruled that paying federal and state payroll taxes for a worker is a “virtual admission” that the worker is an employee under the right of control test (*Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992).) You may look for this case at www.nolo.com in the Legal Research Center.

24. Intent of the Hiring Firm and Worker

Employees. People who hire employees normally intend to create an employer-employee relationship.

Independent Contractors. People who hire ICs normally intend to create an IC-hiring firm relationship.

Some government agencies and courts also consider the intent of the hiring firm and worker. If it appears they honestly intended to create an IC relationship, it's likely that the hiring firm would not believe it had control, nor attempt to exercise control over the worker. One way to establish intent to create an IC relationship is for the hiring firm and IC to sign an independent contractor agreement.

On the other hand, if it appears that you never intended to create a true IC relationship and merely classified the worker as an IC to avoid an employer's legal obligations, then you probably had the right to control the worker.

25. Custom in the Trade or Industry

Employees. Workers who are normally treated like employees in the trade or industry in which they work are likely to really be employees.

Independent Contractors. Workers who are normally treated like ICs in the trade or industry in which they work are likely to really be ICs.

The custom in the trade or industry involved is important. If the work is usually performed by employees, employee status is indicated. And workers customarily treated as ICs may get the benefit of that custom, as long as there is in fact no employee-like control exerted on them.

EXAMPLE: The long-standing custom among logging companies in the Pacific Northwest is to treat tree fellers—people who cut down trees—as ICs. They are customarily paid by the tree, receive no employee benefits and are free to work for many logging companies, not just one. None of the logging companies withhold or pay federal or state payroll taxes for tree fellers. The fellers pay their own self-employment taxes. This long-standing custom is strong evidence that the workers are ICs.

OTHER AGENCIES, OTHER TESTS

Not all government agencies use the right of control test described above to decide whether a worker is an IC or employee. Some workers' compensation and labor law agencies use an economic reality test. Under this test, workers are employees if they are economically dependent upon the businesses for which they render services. This test, which is difficult to apply, is designed to protect low-pay and low-skill workers—that is, to find that such workers are employees for purposes of workers' compensation and labor laws intended to help workers. (For a detailed discussion, see *Hiring Independent Contractors*, by Stephen Fishman (Nolo).)

D. Drafting and Signing an IC Agreement

If you determine that the worker qualifies as an IC, complete and sign an independent contractor agreement before the IC starts work. (See Parts III and IV, for more about independent contractor agreements.)

If the IC has his own agreement, ask for a copy and use it as your starting point in drafting the agreement. This will show that the agreement is a real negotiated contract, not a standard form you forced the worker to sign. Pay particular attention to whether the IC's agreement contains any provisions that should be deleted or amended, or whether new provisions should be added.

E. Obtaining the IC's Taxpayer ID Number

If you pay an unincorporated IC \$600 or more during a year, you must obtain the IC's taxpayer identification number. If you don't, you are required to withhold 31% of all payments over \$599 you make to the IC and remit the money to the IRS. This is called backup withholding. If you fail to backup withhold, on audit the IRS will impose an assessment against you equal to 31% of what you paid the IC.

Backup withholding is not required for ICs who are corporations.

1. How to Avoid Backup Withholding

It's very easy to avoid backup withholding. Have the IC fill out and sign IRS Form W-9, Request for Taxpayer Identification Number, and retain it in your IC file. (See the Appendix for a copy of the

form.) You don't have to file the W-9 with the IRS. This simple form merely requires the IC to list his or her name and address and taxpayer ID number. Corporations, partnerships and sole proprietors must have a federal employer identification number (EIN), which is obtained from the IRS. In the case of sole proprietors without employees, the taxpayer ID number is the IC's Social Security number.

2. Backup Withholding Procedure

If you are unable to obtain an IC's taxpayer ID number or the IRS informs you that the number the IC gave you is incorrect, you'll have to do backup withholding. Backup withholding must begin after you pay an IC \$600 or more during the year. You need not backup withhold on payments totaling less than \$600.

For this procedure, you withhold 31% of the IC's compensation and deposit it every quarter with your bank or other payroll tax depository. These deposits must be made separately from the payroll tax deposits you make for employees.

You report the amounts withheld on IRS Form 945, Annual Return of Withheld Federal Income

Tax. This is an annual return you must file by January 31 of the following year. See the instructions to Form 945 for details. You can obtain a copy of the form by calling the IRS at 800-TAX-FORM (829-3676) or by checking out the IRS website at <http://www.irs.gov>.

F. Keeping Records

Create a file for each IC you hire. Keep these files separate from the personnel files you use for employees. Each file should contain:

- the signed final IC agreement and copies of any interim drafts
- the IRS W-9 form signed by the IC containing the IC's taxpayer identification number
- all the documentation provided by the IC, such as proof of insurance, business cards and stationery, copies of advertisements, professional licenses, copies of articles of incorporation
- all the invoices the IC submits for billing purposes, and
- copies of all IRS Form 1099 you file reporting your payments to the IC.

Keep your IC files for at least six years.



Part III: Written Independent Contractor Agreements

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Part III: Written Independent Contractor Agreements

Although you can hire an independent contractor without any formal agreement, it is never a good idea to do so. In this section, we explain in detail how a written independent contractor agreement can protect you and the IC.

A. Why Use Written Agreements

Using written independent contractor or consulting agreements benefits the independent contractors (ICs) and consultants and the clients who hire them.

1. Oral Independent Contractor Agreements Are Legal But Dangerous

Subject to some important exceptions noted in the sidebar below, most contracts need never be written down to be legally valid. This means that if a dispute arises over an oral contract, the parties can take the matter to court and a judge will rule for one side or the other.

For example, a client and an IC can enter into a contract over the phone or during a lunch meeting at a restaurant. No magic words need be spoken. They just have to agree that the IC will perform services for the client in exchange for something of value—usually money. Theoretically, most oral agreements are as valid as a 50-page contract drafted by a high-powered law firm.

EXAMPLE: Gary, a freelance translator, receives a phone call from a vice-president of Acme Oil Co. He asks Gary to translate some Russian oil industry documents for \$2,000. Gary says he'll do the work for the price. Gary and Acme have a valid oral contract.

In the real world, however, using oral agreements is like driving without a seatbelt—there's no problem as long as you don't have an accident; but, if you do have an accident, you'll wish you had buckled up. An oral IC agreement can work just fine provided that you and the other party remember the contract's terms in the same way and fulfill them as expected by the other party.

Unfortunately, things don't always work so perfectly. Courts are crowded with lawsuits filed by people who entered into oral agreements with each other. Costly misunderstandings can develop if an IC performs services without a clear written description of what he or she is supposed to do and what will happen if it isn't done. Such misunderstandings may be innocent—you and the other party may have misinterpreted each other or failed to listen carefully. Or they may be purposeful—without a written document to prove otherwise, the other side can claim that you orally agreed to anything.

A good written IC agreement is your legal lifeline. If properly drafted, it will help prevent disputes by making it clear exactly what's been agreed to. If problems develop, it will provide ways to solve them. If you and the other party end up in court, it will establish your legal duties to each other.

SOME AGREEMENTS MUST BE IN WRITING

Some types of agreements must be in writing to be legally enforceable. Each state has a law, usually called the Statute of Frauds, that lists the types of contracts that must be written to be valid. A typical list includes:

- any contract that cannot possibly be performed in less than one year. Example: John is hired to perform consulting services for the next two years for \$2,000 per month. Since the agreement cannot be performed in less than one year, it must be in writing to be legally enforceable.
- contracts for the sales of goods—that is, tangible personal property, such as a computer or car—worth \$500 or more.
- a promise to pay someone else's debt. Example: John is hired to perform consulting services for Acme Corporation. John is worried he won't be paid on time, so Sheila, Acme's President, personally guarantees John's payment—that is, she promises to pay John out of her own pocket if Acme Corporation doesn't. The guarantee must be in writing to be legally enforceable.
- contracts involving the sale of real estate, or real estate leases lasting more than one year.
- any transfer of copyright ownership.

2. Advantages of Written Independent Contractor Agreements

Written agreements do more for you than help to avoid misunderstandings or dishonest dealings.

There are important practical reasons why you should always sign a written consulting or IC agreement before work begins.

a. Defining projects

The process of deciding what to include in an agreement forces both the IC and the client to think carefully, perhaps for the first time, about exactly what the IC is supposed to do. Hazy or ill-defined ideas or expectations stand out when they're reduced to writing, spurring further discussion and negotiation until they are reduced to a concrete contract specification of the work that the IC will perform. This gives both sides a yardstick by which to measure the IC's performance and is the best way to avoid later disputes that the IC hasn't performed adequately.

b. Establishing IC status

A well-drafted IC agreement will also help establish that the worker is an IC, not the client's employee. This is vital both for the client and the IC. However, a written IC agreement is not a magic legal bullet. It will *never* by itself turn an employee into an IC. What really counts is the substance of how the worker is treated, not a formality like signing an agreement. If everything else about the working relationship points to IC status, the fact that there is a consistent written agreement underscores this arrangement. Again, it won't help a bit for a worker who is in reality treated like an employee. (See Part II, above, for more about the differences between ICs and employees.)

c. Assuring payment terms

A written agreement clearly setting out the IC's fees will help ward off disputes about how much you agreed to pay.

B. Putting Your Independent Contractor Agreement Together

Make sure your agreement is properly signed and put together. (If it isn't, it might not be legally valid.) This is not difficult if you know what to do. This section provides all the instructions you need to get it right.

1. Signatures

It's best for both parties to sign the agreement and to do it in ink. The two of you need not be together when you sign, and it isn't necessary to sign at the same time. There's no legal requirement that the signatures be located in any specific place in a business contract, but they are customarily placed at the end of the agreement—that helps signify that you both have read and agreed to the entire document.

It's very important that you both sign the agreement properly. Failure to do so can have drastic consequences. How to sign depends on the legal form of the business of the parties signing.

NO INITIALS NEEDED

It's not necessary that both parties initial every page of an agreement. This is sometimes done to make it more difficult for one party to remove a page and add a new one with different terms without the other side knowing about it. If you're afraid the other side might do something like this, you can insist on initialing the pages. Otherwise, don't worry about it.

a. Sole proprietors

A person is a sole proprietor if he or she is running a one-person business and hasn't incorporated or formed a limited liability company. The vast majority of ICs and consultants are sole proprietors, as are many clients.

If you or the other party are sole proprietors, you can each simply sign your own names and nothing more. That's because a sole proprietorship, unlike a corporation or partnership, is not a separate legal entity. For example, if Susie Davis is a sole proprietor who runs custom shopping tours for wealthy tourists, her agreements with her clients can be signed "Susie Davis."

However, if you or the IC use a fictitious business name, it's best for you or the IC to sign on behalf of the business. As an added bonus, this will help show that the worker is an IC, not an employee.

EXAMPLE: Chris Kraft is an IC sole proprietor who runs a marketing research business. Instead of using his own name for the business, he calls it AAA Marketing Research. He should sign his contracts like this:

AAA Marketing Research

By: _____
Chris Kraft

b. Partnerships

If either you or the other party is a partnership, the agreement must be signed on behalf of the partnership, which means that the partnership must be identified in the signature block. Identifying the partnership is very important: If a partner signs only his or her name without mentioning the partnership, the partnership is not bound to

the agreement—only the individual partner will be bound. This means that if you are the other party to the contract, you couldn't go after the partnership's money or assets if the signing partner breaches the agreement and you win a judgment against him or her. Instead, you could obtain only the signing partner's assets.

Conversely, if you're a partner in a partnership and mistakenly sign an agreement as an individual, you're setting yourself up as the legal target if something goes wrong and the other side decides to sue. Since the other side won't be able to sue the partnership, it will look solely to you for legal recourse.

Which partner should sign? If the partnership is a "general" partnership (every partner invests and participates in managing the business), any partner can sign. But some partnerships are "limited partnerships," which means that there is at least one general partner, but also some partners who invest in but *don't* participate in the business. Limited partners should never sign agreements. That's because by law they have no authority to bind the partnership. The agreement should always be signed by a general partner.

Only one partner needs to sign. The signature block for the partnership should state the partnership's name and the name and title of the person signing on the partnership's behalf.

EXAMPLE: The Argus Partnership contracts with Sam for marketing research. Randy Argus is one of the general partners. He signs the contract on the partnership's behalf like this:

The Argus Partnership
A Michigan Partnership

By: _____
Randy Argus, a General Partner

It's possible for a person who is not a partner to legally sign on behalf of the partnership. The signature should be accompanied by a partnership resolution stating that the person signing the agreement has the authority to do so. The partnership resolution is a document signed by one or more of the general partners stating that the person named has the authority to sign contracts on the partnership's behalf. Attach the resolution to the end of the agreement.

c. Corporations

If either you or the other party is a corporation, the agreement must be signed by someone who has authority to sign contracts on the corporation's behalf. The corporation's president or chief executive officer (CEO) is presumed to have this authority.

If someone other than the president of an incorporated entity signs—for example, the vice-president, treasurer or other corporate officer—ask to see a board of directors' resolution or corporate bylaws authorizing him or her to sign. If the person signing doesn't have authority, the corporation won't be legally bound by the contract. Attach the resolution to the end of the agreement.

Keep in mind that if you sign personally instead of on your corporation's behalf, you'll be personally liable for the contract. It's likely that the main reason you've gone to the trouble to form a corporation is to avoid such liability. So signing improperly is self-defeating.

The signature block for a corporation should state the name of the corporation and the name and title of the person signing on the corporation's behalf.

EXAMPLE: Susan Ericson is the President of Kiddie Krafts, Inc. Since she is the president, any contracts signed by her need not be accompanied by a corporate resolution showing she has authority to bind the corporation. The signature block for contracts she signs should look like this:

Kiddie Krafts, Inc.
A California Corporation
By: _____
Susan Ericson, President

d. Limited liability companies

The owners of limited liability companies are called members. Members may hire others to run their company for them, who are called managers. An agreement with a Limited Liability Company should be signed by a member or manager.

EXAMPLE: AcmeSoft LLC, a limited liability company, hires Sally to perform freelance programming services. The contract is signed on AcmeSoft's behalf by Edward Smith, the company's manager. The signature block should appear in the contract like this:

AcmeSoft LLC
A California Limited Liability Company
By: _____
Edward Smith, Manager

2. Dates

When you sign an agreement, include the date and make sure the other party does, too. You can simply put a date line next to the place where each person signs—for example:

_____ Date: _____
Jamie Alvarez

You and the other party don't have to sign on the same day. Indeed, you can sign weeks apart. However, unless the agreement provides a specific starting date, it begins on the date it's signed. If the parties sign on different dates, the agreement begins on the date the last person signed. Until the agreement is signed by both parties, they're not bound by it.

3. Attachments or Exhibits

An easy way to keep an agreement focused on the essential aspects of your arrangement is to use attachments, also called exhibits, to list lengthy details such as performance specifications. (You can also use attachments when someone who normally wouldn't have authority to sign has been given that power by the partnership or corporation, as explained above.) Putting practical details in a separate but attached document makes the main body of the contract shorter and easier to read.

If you have more than one attachment or exhibit, they should be numbered or lettered—for example, Attachment 1 or Exhibit A. The attachments don't have to be dated or signed. Be sure that the main body of the agreement mentions that the attachments or exhibits are included as part of the contract.

4. Altering the Agreement

Sometimes it's necessary to make last minute changes to a contract before it's signed. If you use a computer to prepare the agreement, it's best to make the changes on disk and print out a new agreement.

However, it's not legally necessary to prepare a new contract. Instead, the changes may be handwritten or typed onto all existing copies of the agreement. If you use this approach, be sure that all those signing the agreement also sign their initials as close as possible to the place where the change is made. If both people who sign the entire document don't also initial each change, questions might arise as to whether the change was part of the agreement.

5. Copies of the Agreement

Prepare at least two copies of your agreement. Make sure that each copy contains all the needed exhibits and attachments. Both you and the other party should sign both copies—and each should keep your signed original.

6. Faxing and Emailing Agreements

It has become very common for people doing business with each other to communicate by fax machine or email. Especially when you are hashing out the details of contract clauses, it is very convenient to fax or email drafts back and forth. However, there are some potential problems with using faxes and email.

a. Preserving confidentiality

One problem is preserving confidentiality. You never know who might end up receiving or reading a fax or email message. For this reason, it's wise to place a confidentiality legend such as the following on your faxes or emails:

The messages and documents transmitted with this notice contain confidential information belonging to the sender.

If you are not the intended recipient of this information, you are hereby notified that any disclosure, copying, distribution or use of the information is strictly prohibited. If you have received this transmission in error, please notify the sender immediately.

This legend can be placed on a fax cover sheet or at the beginning of an email message.

If your negotiations are particularly sensitive, you may wish to encrypt your email messages so others can't read them.

b. Signing the finished agreement

When a final agreement is reached, you'll both need to sign the contract. One approach is for one party to sign the contract and fax it to the other, who signs it, makes a photocopy and faxes it back. This way, you each have a copy of the agreement signed by both sides.

A faxed signature is probably legally sufficient if neither party disputes that it is a fax of an original signature. However, if the other party claims that a faxed signature was forged, it could be difficult or impossible to prove it's genuine, since it is very easy to forge a faxed signature with modern computer technology. Forgery claims are rare, however, so this is usually not a problem. Even so, it's a good practice for you and the other party to follow up the fax with signed originals exchanged by mail or air express.

If both you and the other party are advanced computer users, you can "sign" the contract digitally and send it by email. This involves using encryption technology to create a digital signature. This is a technically complex subject beyond the scope of this book. You can find a good deal of material on digital signatures on the Internet. There is also a comprehensive book on digital signature law called *The Law of Electronic Commerce*, by Benjamin Wright (Aspen Law & Business).

C. Changing the Agreement After It's Signed

No contract is engraved in stone. You and the other party can always modify or amend your contract if circumstances change and if you both agree to the changes. You can even agree to call the whole thing off and cancel your agreement.

The key to changing a contract is cooperation. Neither party is ever obligated to accept a proposed modification to a contract. Either of you can always say no to the proposed change and accept the consequences—for example, the other side may go ahead with a unilateral change or stop performing altogether. Either way, you may end up with a court battle over breaking the original contract. You're usually better off reaching some sort of accommodation with the other side, unless he or she is totally unreasonable.

Unless your contract is one that must be in writing to be legally valid—for example, an agreement that can't be performed in less than one year—it can usually be modified by an oral agreement. In other words, you need not write down the changes.

EXAMPLE: Art signs a contract with Zeno, who will build an addition to his house. Halfway through the project, Art decides that he wants Zeno to do some extra work not covered by their original agreement. Art and Zeno have a telephone conversation in which Zeno agrees to do the extra work for extra money. Although nothing is put in writing, their change to their original agreement is legally enforceable.

Hiring firms and ICs change their contracts all the time and never write down the changes. The flexibility afforded by such an informal approach to contract amendments might be just what you want. However, misunderstandings and disputes often arise from this approach. It's always best to have some sort of writing showing what you've

agreed to do. You can do this informally. For example, you can simply send a confirming letter following a telephone call with the other party summarizing the changes you both agreed to make. If the other side doesn't correct your letter in writing, the existence of the letter creates a legal presumption that your version of the contract change is correct. This will be very helpful if the other side later claims he or she never agreed to the change or it's set forth incorrectly in the letter. Be sure to keep a copy of the letter for your files.

EXAMPLE: Janet, a much sought-after editor, agrees to perform editing services for Steve. Her written agreement with Steve provides that her work will be completed by April 1. However, Janet finds the project more time-consuming than she anticipated, and needs more time. She calls Steve and asks him for an extension. Steve agrees to give Janet until May 1 to complete the work. But in return, Janet agrees to a 5% reduction in her fee for the work. Janet sends Steve the following confirming letter setting forth this contract change:

March 15, 20XX
Steve Blaira release
100 Main Street
Marred Vista, Ca. 90000

Dear Steve:

This letter serves to confirm our phone conversation of March 14, 20XX. You agree to extend the deadline for completion of my editing work on your book "The History of Sparta" until May 1, 20XX. In return, I shall reduce my fee for the work by 5%. Instead of charging you \$1,000, I will charge \$950.

Thank you for your cooperation in this matter.

Like the Spartans, I remain with it or on it,

Janet Swift

If an amendment involves a contract provision that is very important, it's wise to insist on a written amendment signed by you and the other party. The amendment should set forth all the changes and state that the amendment takes precedence over the original contract provision. For example, an amendment specifying that payment will be by the piece instead of by the hour should state that the new arrangement removes and is in place of the original understanding.



This kit contains a form for a contract amendment. For instructions on how to create your own form, click “Read Me First” in the table of contents on the left of the screen.

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Part IV: Using the Independent Contractor Agreement in This Kit

This kit contains a general independent contractor agreement that you can use almost any time you contract with someone to do work for you. Both fill-in (RTF) and print-only versions are provided. The agreement is designed to protect your interests as much as possible without being unduly one-sided or unfair to the IC. It also helps establish that the worker is an IC, not your employee.

Call up the agreement on your computer or print out a copy and read it along with the following discussion, which explains the provisions in the form and describes what information you'll need to insert.

Title of agreement. You don't have to have a title for an IC agreement, but if you want one you should call it "Independent Contractor Agreement." For obvious reasons, never use "Employment Agreement" as a title.

Names of independent contractor and hiring firm. When you first write down the name of the IC, it's best to refer to the IC by his or her full name. If an IC is incorporated, use the corporate name, not the IC's own name. For example, write "John Smith Incorporated" instead of just "John Smith."

If the IC is unincorporated and is doing business under a fictitious business name, use that name. A fictitious business name or assumed name is a name sole proprietors or partners use to identify their business, other than their own names. For example, if consultant Al Brodsky calls his one-man marketing research business "ABC Marketing Research," use that name. This shows you're contracting with a business, not a single individual. Never refer to an IC as an employee or to yourself as an employer.

For the sake of brevity, it is usual to identify the IC by shorter names in the remainder of the agreement. You can use an abbreviated version of the IC's full name—for example, "ABC" for "ABC Marketing Research." Or you can refer to the IC simply as "Contractor."

Refer to yourself initially by your full company name and subsequently by a short version of the name, or as "Client" or "Firm."

Include the address of the principal place of business of the IC and yourself. If you or the IC have more than one office or workplace, the principal place of business is the main office or workplace.

Clause 1. Services to Be Performed

The agreement should describe in as much detail as possible what the contractor is expected to do. You must word the description carefully to show only what results you want the IC to achieve. Don't tell the IC how to achieve those results—this indicates that you have the right to control how the IC performs the agreed upon services. Having a right of control is the hallmark of an employment relationship.

While you shouldn't dictate how your IC is to perform the work, it is perfectly fine for you to establish very detailed specifications for the IC's finished work product. The specs should only describe the end results the IC must achieve, not how to obtain those results. The following chart illustrates how work descriptions can either support or undermine your efforts to place your worker firmly within the world of independent contractors.

You can include the description of the work to be done in the main body of the Agreement or, if it's lengthy, on a separate attachment. These options are identified as Alternative A (when you include the explanation of services in the contract) and Alternative B (when the explanation of the services is attached to the contract).

DESCRIBING YOUR INDEPENDENT CONTRACTOR'S JOB

Work descriptions that support IC status	Work descriptions that suggest the worker is an employee
Contractor will deliver the cargo described on the attached manifest to 123 Grub St., Tucson, Arizona, no later than 9:00 a.m. on March 1, 20XX.	Contractor will load cargo as instructed and leave at 9:30 a.m. Use Route 66 until arrival at Poisonby. Take the short cut described on the attached map to avoid traffic. Spend night in Laughlin at Lazy 8 Motel. Leave Laughlin at 9:00 a.m. Arrive at Tucson at 9:00 a.m.
Contractor will paint all walls and ceilings of the offices located at 222 Main St., Suite 101, using two coats of flat white latex paint. All old paint will be removed and wood surfaces will be stripped to bare wood before the new paint is applied.	Contractor will paint all walls and ceilings of the offices located at 222 Main St., Suite 101. Contractor will apply paint to the ceilings first and then the floor trim using brushes, not rollers. The walls will be painted last. Contractor will remove all old paint by hand scraping. Contractor will wear gloves and a white paint uniform and clean all brushes and rollers at the end of each day.
Contractor agrees to prepare an index of Client's book "History of Sparta" of at least 100 single-spaced 8.5" x 11" pages. Contractor will provide Client with a printout of the finished index and a 3.5" computer disk version in WordPerfect format.	Contractor will prepare an alphabetical three-level index of Client's book "History of Sparta." Contractor will first prepare 3" x 5" index cards listing every index entry beginning with Chapter One. After each chapter is completed, Contractor will deliver the index cards to Client for Client's approval. When index cards have been created for all 50 chapters, Contractor will create a computer version of the index using Complex Software Version 7.10. Contractor will then print out and edit the index and deliver it to Client for approval.

Clause 2. Payment

There are two common ways an independent contractor may be paid: by a fixed fee or by unit of time.

a. Fixed fee

Paying an IC a fixed amount for the entire job instead of an hourly or daily rate will help you establish the worker's IC status in the eyes of the government. Remember, a fact of life when people work as ICs is the risk they take that they will underestimate the job (and end up losing money). When an IC sets a fee in advance for the whole job, he or she takes this risk. On the other hand, the IC may earn a substantial profit if the project is completed quickly. Having the opportu-

nity to earn a profit or suffer a loss is a very strong indicator of IC status and is something employees ordinarily do not have.

This method of payment has an added attraction—it ensures that you know exactly how much the IC's work will cost.

Choose Alternative A if you'll pay the IC a fixed fee and insert the amount.

b. Payment by the hour

Many independent contractors—for example, lawyers, accountants and plumbers—customarily charge by the hour, day or other unit of time. Paying an IC by the hour does not support the worker's independent contractor status, but you can get away with it if it's a common practice in the field in which the IC works. Government au-

ditors would likely not challenge the IC status of workers in these occupations so long as there are other strong indicators that they are in business for themselves—for example, they have recurring business expenses (such as office rent), work for more than one client, have significant investment in equipment or facilities, and so forth.

Choose Alternative B if you will pay the IC by the hour or other unit of time and insert the amount of the payment.

If you pay by the hour, you may wish to place a cap on the IC's total compensation. This may be a particularly good idea if you're unsure about the IC's reliability or efficiency. Insert the amount of the cap in this optional provision, or delete this language if you don't want to have a cap.

Clause 3. Terms of Payment

Clause 3 of the agreement specifies how and when you'll pay the IC. Since the IC is running an independent business, he or she should submit an invoice setting forth the amount you have to pay. Keep the IC's invoices in your files—they are evidence, should you ever need it, that you have dealt with the worker as an IC, not an employee.

There are different ways to structure the payments you make to the IC. You can pay the entire amount upon completion, or pay a "down payment" and then the balance upon completion. Or you can set up a schedule for installments. Each method is explained below.

This agreement does not require you to pay a late fee or any other late penalty if your payments to the IC are late. But, of course, paying late is not a good way to keep up good relations with a valuable IC. And, if you don't pay at all, the IC can sue you in court for the amount due or subject the matter to arbitration if required by the agreement. (See Clause 18.)

a. Full payment upon completion of work

Choose Alternative A if you'll pay the IC the full amount of a fixed fee upon completion of the work. Indicate how soon you'll pay the IC after you receive his or her invoice. Thirty days is a common payment period, but you can choose a longer or shorter period.

b. Divided payments

Some ICs will insist on a partial down payment of their fixed fee before they begin work. Choose Alternative B if you agree to this arrangement. Insert the amount of the fixed fee you'll pay when the Agreement is signed. Many ICs will ask for anywhere from one-fourth to one-half of the amount due in advance. However, this is always a matter for negotiation. It's ordinarily best for the hiring firm to pay an IC as little as possible in advance. The less you pay the IC up front, the more incentive he or she will have to complete the job quickly and get paid the balance due. Moreover, if the IC's work turns out to be unsatisfactory, you'll have more leverage to get the IC to redo the job if you haven't given the IC a large advance payment.

c. Installment payments for complex projects

ICs may balk at waiting for a fixed fee for complex or long term projects due to difficulties in accurately estimating how long the job will take. One way to deal with this problem is to break the job down into phases or milestones and pay the IC a fixed fee upon completion of each phase. If, after one or two phases are completed, it looks like the fixed fee won't be enough to complete the entire project, you can always renegotiate the agreement. Or, if you prefer, you can mutually agree to cancel the agreement and hire someone else to complete the project. This type of arrangement is far more supportive of an IC relationship than hourly payment, since the IC still has some risk of loss.

To set up this arrangement, draw up a schedule of installment payments tying each payment to the completion by the IC of specific services and attach it to the agreement. The main body of the agreement simply refers to the attached payment schedule. Choose Alternative C for this option.

EXAMPLE: The Splashy Swimming Pool Company hires Dave, a freelance computer programmer, to develop a specialized accounting system. Splashy and Dave agree that the lengthy project will be divided into four phases or modules, consisting of an accounts receivable, accounts payable, order processing and invoicing module. Dave will be paid a specified amount upon completion of each module. Splashy and Dave draw up the following schedule and attach it to their agreement:

SCHEDULE OF PAYMENTS
Client shall pay Contractor according to the following schedule of payments:
1. \$5,000 when an invoice is submitted and the following services are completed: Accounts receivable module is completed and accepted by Client.
2. \$5,000 when an invoice is submitted and the following services are completed: Accounts payable module is completed and accepted by Client.

d. Hourly payment agreements

Even ICs who are paid by the hour or other unit of time should submit invoices. *Never automatically pay an IC weekly or bi-weekly the way you pay employees.* It's best to pay ICs no more than once a month since this is how businesses are normally paid. Choose Alternative D if you're pay-

ing the IC by the hour. Indicate how soon you'll pay the IC after you receive his or her invoice.

Clause 4. Expenses

Estimating expenses and factoring-in these costs when bidding on a job is a hallmark of a person in business for himself or herself. For this reason, an IC should usually not be reimbursed for expenses. Make clear to the IC that you will not reimburse him or her for expenses and that the IC's set fee or hourly rate is all the money he or she will get. Choose Alternative A if the IC will pay all his or her own expenses.

However, for certain types of ICs it is customary to pay some expenses. For example, attorneys typically charge their clients separately for photocopying charges, deposition fees and travel. Similarly, a sales or marketing consultant may charge for mileage and phone calls. Where there is an otherwise clear IC relationship and payment of expenses is customary in the IC's trade or business, you can probably do it without risking a government agency deciding that the worker is really an employee. Choose Alternative B if you'll reimburse the IC for expenses and list exactly what expenses will be reimbursed.

Be careful to agree to only reimburse an IC's expenses that are *directly attributable* to his or her work for you. Examples of expenses that you may agree to reimburse include:

- travel expenses other than normal commuting, including airfares, rental vehicles and highway mileage in company or personal vehicles at a given number of cents per mile (for example, 30 cents)
- telephone, fax, online and telegraph charges
- postage and courier services, and
- printing and reproduction.

Never reimburse an IC for his or her normal fixed overhead costs, such as office rent or commuting to and from the IC's office. These are expenses that should be covered by the business revenues as a whole, not individual clients.

Clause 5. Materials, Equipment and Office Space

Providing workers with tools and equipment is an indicator of employee status. Therefore, it's not advisable to provide an IC with materials, tools or equipment. For example, if you're hiring an IC to drive a truck, don't give him a truck. The IC should buy or lease the truck elsewhere. This clause simply states that the IC will provide all tools, equipment, materials and supplies needed to accomplish the project.

If you must break this rule and provide the IC with tools or equipment, it's best for the agreement to be silent on the matter. Delete this clause entirely and re-number the remaining clauses.

a. Leasing equipment (optional)

If you must provide your IC with tools or equipment, you may be able to do so in a way that will, in fact, support your client's status as an IC. If the tools, equipment or materials have substantial value, either sell or lease the items to the IC.

Charge the IC the same amount you'd charge anyone else. If you lease equipment to the IC, enter into a written lease agreement. If you sell the IC equipment, use a written bill of sale. You can find forms for selling or leasing equipment in *Legal Guide For Starting & Running a Small Business, Volume 2: Legal Forms*, by Fred Steingold (Nolo).

b. Providing ICs with office space (optional)

It's sometimes more convenient for a hiring firm to have an IC work at its offices than at the IC's own office. If you wish to provide the IC with office space on your premises, you should charge rent. Only employees are ordinarily provided with free offices. Charging rent will not only make you some money, it will help establish that the worker is an IC because the expense will give the worker a risk of loss—that is, if the IC doesn't earn

enough to pay for this and other expenses, he or she risks losing money.

If you're just providing the IC a desk to use for a small charge, you can include the simple optional rental clause in your IC agreement. If you include this clause, clearly define exactly what office space and facilities you're providing the IC—for example, will the IC be allowed to use your copier and fax machine? The rental amount should be a fixed amount, not based on how much money the IC earns.

On the other hand, if you're going to provide the IC with a substantial amount of space, it's advisable to use a more detailed, full-fledged commercial lease agreement. You can find a form for such a lease in *Legal Forms For Starting & Running a Small Business*, by Fred Steingold (Nolo).

Clause 6. Independent Contractor Status

One of the most important functions of an independent contractor agreement is to help establish that the worker is an IC, not your employee. The key to doing this is to make clear that the IC, not the hiring firm, has the right to control how the work will be performed.

The language in this clause addresses most of the factors the IRS and other agencies consider in determining whether an IC controls how the work is done.



When you draft your own agreement, include only those provisions in Clause 6 that apply to your particular situation. The more that apply, the more likely the worker will be viewed as an IC.



This clause will only help you establish IC status if it is actually true. If the reality is that you have the right to control the worker, then the clause won't do you much good with government auditors.

Clause 7. Business Permits, Certificates and Licenses

People who are in business for themselves are often required to have various types of business permits, certificates or licenses. License requirements may be imposed by both your state and local government.

A few states, including Alaska and Washington, require all businesses to obtain state business licenses. Most states don't require general business licenses, but they all require licenses for ICs who work in certain occupations—for example, lawyers, doctors, architects, nurses and engineers must be licensed in every state. Most states require licenses for other occupations as well—for instance, bill collectors, building contractors and real estate salespeople. Many cities and counties also require that ICs have business licenses, even if they work at home.

ICs who lack such licenses may be fined by state or local government entities. As a general rule, no action is taken against hiring firms who hire unlicensed ICs. Nevertheless, it is in your interest to make sure the IC has any required licenses. Lack of such licenses and permits makes a worker look like your employee, not an IC in business for himself or herself.

The IC should obtain the necessary licenses and permits on his or her own. You should neither be involved in the application or certification procedure, nor pay for them. This clause simply requires that the IC have all relevant licenses and permits. You need add no information here.

It's a good idea to obtain copies of the IC's licenses and keep them in your file. They will help establish that the worker is an IC if you're audited.

Clause 8. State and Federal Taxes

You should never pay or withhold any taxes on an IC's behalf. Doing so is a very strong indicator that the worker is an employee. Indeed, some courts have held that workers were employees based upon this factor alone.

This straightforward provision helps make sure the IC understands that he or she must pay all applicable taxes. You need add no information here.

Clause 9. Fringe Benefits

Do not provide either ICs or their employees with fringe benefits that you extend to your own employees, such as health insurance, pension benefits, childcare allowances or even the right to use employee facilities like an exercise room. This clause makes clear that the IC will receive no such benefits. You need add no information here.

Clause 10. Workers' Compensation

Each state has its own workers' compensation system that is designed to provide replacement income and medical expenses for employees who suffer work-related injuries or illnesses. To fund this system, employers in all but a handful of states are required to pay for workers' compensation insurance for their employees, either through a state fund or a private insurance company. Employees do not pay for workers' compensation insurance.

You need not—and should not—provide workers' compensation coverage for a worker who qualifies as an IC under your state workers' compensation law. This can result in substantial savings.

LIABILITY INSURANCE: A MUST FOR HIRING FIRMS

Employees who are covered by workers' compensation cannot sue their employers for damages when they are injured on the job. They are limited to receiving workers' compensation benefits. This is not the case when you hire ICs. That is, ICs can sue you for work-related injuries. For this reason, no matter how small your business, if you hire ICs it is vital that you obtain general liability insurance to protect yourself against personal injury claims by people who are not your employees.

A general liability insurer will defend you in court if an IC, customer or any other nonemployee claims you caused or helped cause an injury. The insurer will also pay out damages or settlements up to the policy limits. Such insurance can be cheaper and easier to obtain than workers' compensation coverage for employees, so you can still save on insurance premiums by hiring ICs rather than employees. If you don't have general liability insurance already, contact an insurance broker or agent to obtain a policy.

Each state has its own workers' compensation law with its own definition of who is an employee and who qualifies as an IC. When you first hire a worker, it's up to you to determine whether he or she is an employee or IC under your state's law. However, your state's workers' compensation agency enforces this law. It may audit you and impose fines and penalties if it determines you've misclassified employees as ICs.

Most states classify workers for workers' compensation purposes using the "right of control" test. This is the same test the IRS and many other government agencies use. However, some states use different tests. You should familiarize yourself with your state's test. (See Worker Classification Factors Chart in the Appendix.) For a detailed discussion of these state tests, see [Hiring Independent Contractors](#), by Stephen Fishman (Nolo). You can also contact your state workers' compensation agency for information.

a. **Make sure the IC's employees are covered**

If the IC has employees, it's very important for the IC to provide them with workers' compensation coverage if required by your state law. If the IC fails to do so, the IC's employees may be considered to be *your* employees for workers' compensation purposes under your state workers' compensation law, even though they may not be considered your employees for other purposes, such as tax treatment.

If an IC's employees lack workers' compensation coverage and you have employees whom you have insured, it's likely your workers' compensation insurer will require you to provide coverage under your own policy for these additional workers. You'll have to pay an additional workers' compensation premium.

To avoid having to insure someone else's employees, you should require ICs to provide you with a certificate of insurance establishing that an IC's employees are covered by workers' compensation insurance. A certificate of insurance is issued by the workers' compensation insurer and is written proof that the IC has a workers' compensation policy. Make sure the policy covers the dates the IC's employees will be performing services for you. If it has expired, do not take the IC's word for it that the policy has automatically renewed. Demand a current certificate. To be extra cautious, get the IC's promise in writing that he or she will notify you immediately if the policy has, for whatever reason, been canceled.

b. Requiring the IC to insure himself

ICs who have no employees usually will not have workers' compensation coverage for themselves. Business owners don't have to provide compensation coverage for themselves, only for employees. Nevertheless, you may want to require the worker to obtain his or her own workers' compensation coverage.

Your own workers' compensation insurer (or liability insurer) may impose this condition on you. Workers' compensation insurers are worried that uninsured ICs may claim they are really employees if they are injured on the job and try to recover benefits from the hiring firm's workers' compensation insurer. And liability insurers don't want to be stuck with the bill if an uninsured IC is injured on your property. (They'll want to know that there is another insurer—the IC's own—to share the bill.) Check your workers' compensation or general liability policy, or ask your agent, to learn whether you are required to obtain certificates of insurance from ICs who work for you, establishing that the IC himself is insured.

Choose the Optional Language if you want the worker to provide his or her own workers' compensation coverage.

Clause 11. Unemployment Compensation

Federal law requires that all states provide most employees with unemployment compensation, called unemployment insurance in some states. Employers are required to contribute to a state unemployment insurance fund. Except in a handful of states, employees make no contributions. An employee who is laid off or fired for reasons other than serious misconduct is entitled to receive unemployment benefits from the state fund.

Unemployment compensation is only for employees. ICs cannot collect it. Firms who hire ICs don't have to pay unemployment compensation taxes for them. This is one of the significant benefits of classifying workers as ICs, since unemployment compensation taxes typically amount to hundreds of dollars per year for each employee.

Each state has its own unemployment compensation law administered by a state agency, often called the department of labor. Like the determination of who is and is not an employee for purposes of workers' compensation, explained above for Clause 10, each state's law defines who is and who is not an employee for unemployment compensation purposes. When you first hire a worker, it's up to you to decide whether he or she is an employee or IC for unemployment compensation purposes. But again, your classification decisions may be reviewed by your state's unemployment compensation agency. If it determines you've misclassified an employee as an IC, it will impose fines and penalties.

Unfortunately, you're more likely to be audited by a state unemployment compensation auditor than by any other type of government auditor, including the IRS. This is because ICs often file claims for unemployment compensation when their services for a hiring firm are completed. The ICs claim they should have been classified as employees all along and so are entitled to unemployment compensation payments.

Many states use the right of control test to determine whether a worker is an IC or employee for unemployment compensation purposes. You should familiarize yourself with your state's test for determining worker status for unemployment compensation purposes. (See Worker Classification Factors Chart in the Appendix.)

For a detailed discussion of these state tests, refer to *Hiring Independent Contractors*, by Stephen Fishman (Nolo). You can also contact your state unemployment compensation agency for information.

If the worker qualifies as an IC under your state's unemployment compensation law, do not pay unemployment compensation taxes for him or her. The IC will not be entitled to receive unemployment compensation benefits when the work is finished or the agreement terminated. Clause 11 makes this clear. You need add no information.

Clause 12. Insurance

An IC should have his or her own liability insurance policy just like any other business; you need not provide it. This type of coverage insures the IC against personal injury or property damage claims by others. For example, if an IC accidentally injures a bystander or one of your employees while performing services for you, the IC's liability policy will pay the costs of defending a lawsuit and money damages up to the limits of the policy coverage.

This clause requires the IC to obtain and maintain a commercial liability insurance policy providing a minimum amount of coverage. You need to state how much coverage is required. How much coverage should the IC have? At least as much as you think it likely he or she might be sued for as a result being negligent while performing services on your behalf. \$500,000 to \$1 million in coverage is usually adequate. But you might want the IC to have even more coverage if he or she is engaged in a hazardous activity. If you're not sure how much coverage to ask for, ask your own insurance broker or agent to advise you.

The insurance clause also requires the IC to add you as an "additional insured" under the policy. This step is a low-cost endorsement the IC can easily have added to his or her liability policy by simply calling his or her agent and asking for it. Being added as an "additional insured" under the IC's policy means that the person who is an additional insured (you) will have all of the benefits of the policy's protections. If you are sued along with the IC in a lawsuit by someone injured by the IC's negligence, the IC's policy will provide defense and pay any claim or verdict up to the limits of the policy. It's to your obvious advantage to involve the IC's insurance company instead of your own if you're named in a lawsuit arising from the IC's negligence.



Do not confuse the term "named insured" with "additional insured."

If you are added to a policy as a "named insured," the protections of the policy extend beyond you to your partners, officers, employees, agents and affiliates. Because the coverage is so broad, it may cost as much as 50% of the original premium to add a "named insured" to an IC's policy. Understand that being added as an "additional insured" is cheap (or free) for a good reason—it covers only the individual whose name appears on the certificate.

The clause also requires the IC to indemnify you—that is, personally repay you—if somebody whom he or she injures decides to sue you. You may be wondering why you need this if you're already a named insured under the IC's liability policy. Well, there may be circumstances under which you're unable to collect from the IC's insurer—for example, the insurer may deny coverage for some reason. Or the claim may exceed the policy limits of the IC's insurance. In this event, the indemnity clause requires the IC to personally repay you. This gives you additional protection but, of course, will only be useful if the IC has the money to repay you (which is why you want the IC to have insurance in the first place).

Clause 13. Term of Agreement

“Term of the agreement” simply refers to when it begins and ends. Unless the agreement provides a specific starting date, it begins on the date it’s signed. This clause establishes that the agreement begins—becomes effective—only after both you and the IC sign. If you and the IC sign on different dates, the agreement begins on the date the last person signed. Until the agreement is signed by both you and the IC, you’re not bound by it.

The start date for the agreement marks the moment when you and the IC are legally bound by it—that is, are supposed to perform as promised. The IC doesn’t necessarily have to begin work on the start date. Both you and the IC are legally bound as of the start date even if the IC hasn’t actually commenced work.

An independent contractor agreement should have a definite ending date. This ordinarily will mark the final deadline for the IC to complete his or her services. However, even if the project is lengthy, the end date should not be too far in the future. (A good outside time limit is six to 12 months.) A longer term makes the agreement look like an employment agreement, not an independent contractor agreement.

If the work is not completed at the end of the term, you can negotiate and sign a new agreement. For now, insert the termination date in this clause. This is the outside termination date. The agreement will end automatically when the Contractor completes the services (which could be before the termination date) or if either party terminates the agreement as provided below.



Your obligations don’t cease when the work is done. Even after the work is finished, you and the IC are still bound by some of the agreement’s terms. You’re still required to pay the IC, for example. And the IC will be bound by any warranties he or she has made and by any duty of confidentiality imposed by the agreement. (See Clause 17.)

Clause 14. Terminating the Agreement

If all goes swimmingly, your agreement with the IC will end when the work is completed. But what if you are dissatisfied with the IC’s lack of progress, work habits or interim results—how should you end the relationship? The circumstances under which you may terminate the agreement are important because they can have a big impact on whether the worker is viewed as an IC or employee by a government auditor.

You should not retain the right to fire or terminate an IC for any reason or no reason at all—a right you do have with an employee under the generally prevailing employment-at-will doctrine. This type of unfettered termination right indicates an employment relationship. Instead, you should be able to terminate the agreement only if you have a justifiable business reason (or reasonable cause) to do so, as explained below.

a. Termination for reasonable cause

You should not terminate the IC unless you have a reasonable cause for doing so. There are two types of reasonable cause. The first is a serious violation of the agreement by the IC. It would include, for example, the IC’s failure to produce results or meet the deadline specified in the agreement.

EXAMPLE: The Solid Construction Company hires Joe to paint some houses Solid is constructing. Joe agrees to paint five houses per month for the next six months. At the end of two months, Joe has only painted two houses. As a result, Solid is unable to sell the unpainted houses. Joe’s substantial failure to deliver the agreed upon results in the time allotted constitutes reasonable cause for Solid to terminate its agreement with him.

You can also terminate the agreement if the IC does something that exposes you (or threatens to expose you) to liability for personal injury or property damage—for example, if the IC’s negligence injures your employees, damages your property or damages someone else’s property. This is a matter of plain fairness—since you stand to lose money if you are sued or have to replace your own damaged property, you shouldn’t have to stand idly by and watch the damage mount up. In short, you may not want to continue dealing with an IC who is extremely careless.



No law requires you to terminate an IC who is careless and causes damage. But keep in mind that if you continue a relationship with an IC whom you know to be “walking trouble,” and someone is injured or property is damaged by the IC’s actions, you may find yourself sued along with the IC by the injured party.

Use this power to terminate wisely. If you rashly fire an IC who performs adequately and otherwise satisfies the terms of the agreement, you’ll be liable to him or her for breaking the agreement. The IC can sue you in court and obtain a judgment against you for money damages.

Choose Alternative A to preserve your limited termination rights.

b. Termination with notice

Some hiring firms just can’t live with the limited termination rights described in Subsection a, above. They demand the right to terminate an IC for any reason. Such a right is not supportive of the worker’s IC status. However, if most of the other aspects of your relationship strongly suggest that the worker is an IC, you may be able to get away with it.

For example, you can get away with unfettered termination rights if you’re paying the IC by the project instead of by the hour, the IC has recurring business expenses, multiple clients and employs assistants. All these factors strongly point

to an IC relationship and will likely outweigh the fact that the agreement contains an at-will termination provision.

On the other hand, this provision may provide the final nail in the coffin if other factors strongly suggest that the IC is your employee: For example, if the IC is paid by the hour, works on your premises even though the work could be done elsewhere, works only for you and performs all the services personally, he will look more like an employee than an IC. Making him subject to at-will firing may simply re-enforce this conclusion.

Choose the second alternative to have the right to terminate the agreement for any reason upon written notice and insert how many days notice you’ll give the IC. The notice term can be anywhere from a few days to 30 days or more, depending upon the length of the contract term. The longer the term, the more notice you should give.

Clause 15. Exclusive Agreement

Business contracts normally contain a provision stating that the written agreement embodies the complete agreement between those involved. In other words, the provision states that there are no other written agreements or oral understandings floating around that also represent the understandings reached between you and the IC. It means that neither you nor the IC can later bring up side letters, oral statements or other material not covered by or attached to the contract. This clause prevents either side from claiming that promises not contained in the written contract were made and broken.

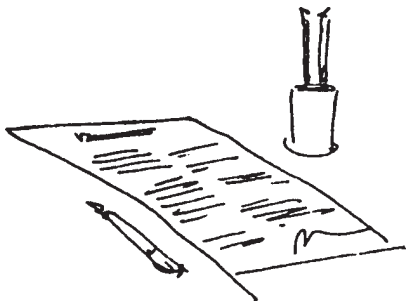
Because of this provision, you must make sure that all documents containing any representations made by the IC upon which you are relying are attached to the agreement as exhibits. This may include the IC’s proposal or bid, sales literature, side letters and so forth. If they aren’t attached, they won’t be considered to be part of the agreement. And if you and the IC have reached some oral agreements, make sure to write them down and attach them to the contract.

Clause 16. Modifying the Agreement (Optional)

No contract is engraved in stone. You and the IC can always agree to modify or amend your contract if circumstances change. You can even agree to call the whole thing off and cancel your agreement.

Unless your contract is one that must be in writing to be legally valid—most commonly, an agreement that can't be performed in less than one year—it can usually be modified by an oral agreement. In other words, you need not write down the changes. But it's a good idea to reduce any changes to writing. This avoids disputes arising from misunderstandings or even intentional shiftiness.

Although not absolutely necessary, it's a good idea to require all amendments be in writing signed by you and the IC before they become binding. You can still negotiate changes by phone or fax, but they won't change the agreement until you and the IC sign a formal amendment to the agreement. This eliminates even the possibility of orally amending the agreement. This approach requires more time and paperwork, but provides you with the security of knowing that it will be impossible for the IC to legally enforce any claimed oral amendment to the agreement.



a. Significant changes require mutual give-and-take

To be legally enforceable, a contract modification that significantly increase's one party's burdens or reduces its benefits must be supported by what lawyer's call "consideration"—that is, each party must receive something of value in return for agreeing to the change in the original agreement. For example, if you and the IC agree that the IC will perform additional services not required by your original agreement, the IC's promise to do extra work for you will be enforceable only if you give him or her something of value in return (usually additional money). Similarly, your agreement to modify the original contract so as to give the IC much more time to complete the work would be enforceable only if the IC gave *you* something of value in return—for example, a reduction in the IC's fee.

b. Your duty to seriously consider a proposed change

Neither you nor the IC are legally required to accept a proposed change to your contract. But because you are legally obligated to deal with each other fairly and in good faith, you can't simply refuse all reasonable requests for modifications without attempting to reach a resolution. The duty to deal in good faith means that you can't use the writing as a set of blinders or a wholesale excuse to refuse to reconsider.



A form that can be used to amend your agreement is provided in this kit. You'll need to fill-in the appropriate information.

Clause 17. Confidentiality (Optional)

ICs often learn about a hiring firm's trade secrets during the course of their work. A trade secret is information or know-how that is not generally known by others and that provides its owner with a competitive advantage in the marketplace. The information can be an idea, written words, a formula, process or procedure, technical design, customer list, marketing plan or any other secret that gives the owner an economic advantage.

SOME ORAL MODIFICATIONS WILL STICK

Even if your agreement requires all modifications to be set forth in writing, as we suggest, some oral modifications may be legally enforceable in some circumstances. This happens when the party seeking to enforce the oral modification has relied on the other party's oral representations and would be unfairly harmed if the oral modification weren't upheld. Basically, courts will enforce the modification if it would be unfair not to do so. For example, if an IC relies on your oral promise to pay the IC more than the original agreement price in exchange for additional work, you will be legally bound by your promise if the IC actually performs the work in reliance on your oral agreement to pay more.

If a trade secret owner takes reasonable steps to keep the confidential information or know-how secret—for example, does not publish it or otherwise make it freely available to the public—the laws of most states will protect the owner from disclosures of the secret by:

- the owner's employees
- people who agree not to disclose it—for example, ICs
- industrial spies, and
- competitors who wrongfully acquire the information.

“Confidential information” is broadly defined by this clause defined to include:

- the written, printed, graphic or electronically recorded materials you furnish the IC, and any materials you mark “confidential” or with a similar legend
- your business plans, customer lists, operating procedures, trade secrets, design formulas, know-how and processes, computer programs and inventories, discoveries and improvements of any kind, and
- information belonging to your customers and suppliers about whom Contractor gained knowledge as a result of Contractor's services for you.

Since an IC whom you hire today may end up working for a competitor tomorrow, it's very important that you make clear to the IC that you expect him or her to protect your trade secrets—that is, not disclose them to others without your permission.

Be aware, however, that not everything qualifies as a trade secret. For example, the general knowledge, skills and experience an IC acquires while working for you are not trade secrets and are therefore not covered by this nondisclosure provision. Other things that don't qualify as your trade secrets include:

- material which is publicly available—for example, published in a trade journal,
- material already in Contractor's possession or known to Contractor without restriction before he or she began working for you, and
- material the IC obtains from sources other than you.

As you can see, it can be difficult to tell what is an IC's general knowledge and what is your trade secret. To protect yourself as much as possible from the disclosure of trade secrets, include Clause 17's nondisclosure provision in the agreement. This provision states that the IC may not disclose your confidential information to others without your permission. If the IC violates this clause, you can sue him or her. You may also sue the person or company the IC disclosed your information to if

you can show that it knew or had reason to know that the IC owed a duty to you to keep the information confidential. You may be able to obtain damages and an injunction (court order) preventing a competitor from using the information.

If there are any specific items of information you want to make sure the IC knows not to disclose, add them in the “other” section of the clause. The provision also requires the IC to return all your materials to you when the services end.

Clause 18. Resolving Disputes

If you and the IC get into a dispute—for example, over the price or quality of the IC’s services—you should always attempt to resolve it first through informal negotiations between the two of you. This is by far the easiest and cheapest way to resolve any problem.

Unfortunately, informal negotiations don’t always work. If you and the IC reach an impasse, you may need help. This part of the agreement describes how you will handle any disputes you can’t resolve on your own. Three alternatives are provided. You need to choose one.

a. Court litigation

Choose alternative A if you want to resolve disputes by going to court. This is the traditional way contract disputes are resolved. It is also usually the most expensive and time consuming. Using this clause doesn’t mean you can never enjoy the benefits of mediation and arbitration discussed below. If you and the IC agree, you can always submit a dispute to mediation or arbitration instead of going to court. However, you can’t force the IC to agree.

SMALL CLAIMS COURTS HELP YOU RESOLVE DISPUTES

Litigation in small claims court is inexpensive and faster than regular trial court. Small claims courts are designed to help resolve disputes involving a relatively small amount of money. The amount ranges from \$2,000 to \$25,000, depending on the state in which you live. (See a chart with 50-state limits at <http://www.nolo.com/encyclopedia/articles/cm/cm19.html>.) If your dispute concerns more money than the small claims limit, you can waive the excess and still bring a small claims suit. You don’t need a lawyer to sue in small claims court; indeed, lawyers are barred from small claims court in several states. For a step-by-step guide on taking a case to small claims court, see *Everybody’s Guide to Small Claims Court*, by Ralph Warner (Nolo).

The optional language in Alternative A provides that if either person has to sue the other in court to enforce the agreement and wins—that is, becomes the prevailing party—the loser is required by this clause to pay the other person’s attorney fees and expenses. (Without this clause, each side must pay its own expenses.) This can help make filing a lawsuit economically feasible and will give the IC an additional reason to settle if you have a strong case. And, of course, it will make *you* pause if you are considering filing suit with a weak case.

Note carefully that this “attorneys fees and costs” clause only covers disputes arising under your contract. It will not, for example, cover a lawsuit by the IC against you for personal injuries. Nor will you be entitled to attorney fees if a contractual dispute with the IC is settled before trial unless you get a concession from the IC that you are the prevailing party. Most suits are settled without trial, and a concession by the other side that you are entitled to fees and costs will be hard

won. So even if you have an attorney fees clause and end the dispute thinking that you've come out ahead, you may still have to pay your own costs and fees.

Before deciding to include this fees and costs clause, think carefully about the circumstances of this particular IC and this particular job. There may be cases in which you do not want to include an attorney fees provision. An IC who has little or no money won't be able to pay the fees, so the provision is useless as far as you're concerned. What's worse, an attorney fees provision could help the IC convince a lawyer to file a case against you, since the lawyer will be looking to you for his or her fee instead of asking the IC to provide an up-front cash retainer. If you have substantially more financial resources than the IC or think it's more likely you'll break the contract than the IC will, an attorney fees provision is not in your interests. In this event, don't include this optional clause in your agreement.

b. Mediation

Choose Alternative B if you want to try mediation before going to court. Mediation, an increasingly popular alternative to full-blown litigation, works like this: You and the IC agree on a neutral third person to try to help you settle your dispute. The mediator tries to help you arrive at a decision, but he or she has no power to impose one. In other words, unless both parties agree with the resolution, there is no resolution.

Insert the place where the mediation meeting will occur. You'll usually want it in the city or county where your office is located. You don't want to have to travel a long distance to attend a mediation.

If the mediation doesn't help, you still have the option of going to court. If you wish, you may include the optional clause requiring the loser in any court litigation to pay the other party's attorney fees. (See the discussion in Subsection a, above, regarding the practical considerations to consider when contemplating a "fees and costs" clause.)

c. Arbitration

Choose Alternative C if you want to avoid court altogether. Under this clause, you and the IC agree that you'll first try to resolve your dispute through mediation. If this doesn't work, you must submit the dispute to binding arbitration. Arbitration is usually like an informal court trial without a jury, but involves arbitrators instead of judges.

You and the IC can agree on anyone to serve as the arbitrator. Arbitrators are often retired judges, lawyers or persons with special expertise in the field involved. Businesses often use private dispute resolution services that maintain a roster of arbitrators. The best known of these is the American Arbitration Association, which has offices in most major cities.

You may be represented by a lawyer in the arbitration, but it's not required. The arbitrator's decision is final and binding—that is, you can't go to court and try the dispute again if you don't like the arbitrator's decision, except in unusual cases where the arbitrator was guilty of fraud, misconduct or bias.

Be aware that, by using this provision, you're giving up your right to go to court. The advantage is that arbitration is usually much cheaper and faster than court litigation. And if your arbitrator is someone familiar with the subject matter of the dispute, you may save time and energy by not having to explain the "lay of the land" as you would if you were putting your case before someone totally unfamiliar with the type of work you do.

This provision states that the arbitrator's award can be converted into a court judgment. This means that if the losing side doesn't pay the money required by the award, the other party can easily obtain a judgment and enforce it like any other court judgment—for example, by seizing the losing side's bank accounts and property to pay the amount due.

The provision leaves it up to the arbitrator to decide who should pay the costs and fees associated with the arbitration.

You must insert the place where the arbitration hearing will occur. You'll usually want it in the city or county where your office is located. You don't want to have to travel a long distance to attend an arbitration.



For a detailed discussion of mediation and arbitration, refer to *Mediate Your Dispute*, by Peter Lovenheim (Nolo).

Clause 19. Applicable Law

As you doubtless know, each state has its own system of laws and courts. Most of the time, you and the IC will have offices in the same state and the work the IC performs will be done in that same state. In this event, it's obvious that your contract should be interpreted according to the law of this state. This law will determine, for example, how long you have to file a lawsuit if the IC breaks the agreement.

However, things aren't so simple if you and the IC are in different states or all or part of the work the IC performs is in another state. For example, a New Jersey business may employ a New York IC to do work on property it owns in Vermont. In this event, if relations go sour, lawyers will engage in a complex legal analysis to determine which state's law should apply to the dispute.

To avoid this lengthy and costly preliminary legal entanglement, it's common for parties to contracts to agree in advance which state's law should apply in the event of a dispute. In addition to avoiding additional lawyer fees, choosing which state's law will apply allows you (or a savvy IC) to pick the state with laws most favorable to you. Courts ordinarily enforce such agreements.

In most cases, choosing the law of your home state will be to your advantage, since its law is familiar to both you and your attorney. This clause allows you to do so. Consult an attorney before choosing the law of the IC's home state or the state where the work is to be done.

Clause 20. Notices

When you want to do something important involving the agreement—terminate it, for example—you need to tell the IC about it. This is called giving notice. The following provision gives you several options for providing the IC with notice: by personal delivery, by mail or by fax or telex followed by a confirming letter.

If you give notice by mail, it is not effective until three days after it's deposited in the mail. For example, if you want to end the agreement on 30 days notice and you mail your notice of termination to the IC, the agreement will not end until 33 days after you mailed the notice.

Clause 21. No Partnership

Whenever two or more people decide to carry on as co-owners of a business for profit, a partnership is automatically created unless the co-owners form a corporation or a limited liability company. Contrary to what you might think, a partnership may be created without any "official" steps like filing papers with a secretary of state (which must be done to form a corporation or a limited liability company). While you and the IC may want to work closely on your project, you definitely don't want to be the IC's partner. Why? Because partners are liable for each other's debts.

This clause serves two purposes. First, it helps make clear to the IC that he or she is not your partner and should not represent himself as such. Rather, the IC is a separate business that you have hired to perform a service. Make sure the IC doesn't do anything to make others think he is your partner—for example, including your name on his business stationery.

This clause will also prove helpful if a creditor of the IC attempts to sue you for the IC's debts by claiming you're his or her partner. It shows that you never intended to enter into a partnership relationship with the IC and therefore should not be liable for his or her debts. In other words, the

clause will help provide you with a defense against such a creditor's claim.



Of course, this clause can only protect you if it is true. If the reality is that you and the workers operate as partners, then the clause won't help negate your partnership.

Clause 22. Assignment and Delegation

Normally, the person or firm you deal with at the contract-signing stage—the independent contractor—will be the one who does the work and you'll be the one for whom the work is done. But in an effort to promote flexibility in business relations, the law doesn't automatically insist that the original IC or you stick with the contract throughout its life. Instead, subject to important restrictions, either of you may assign your rights or delegate your duties under the agreement.

An "assignment" is the process by which rights or benefits under a contract are transferred to someone else. For example, you might assign the right to receive the benefit of the IC's services to someone else. Such a person is called an "assignee." When this occurs, the assignee steps into your shoes. The IC must now work for the assignee, not for you.

EXAMPLE: Acme Inc. has signed an IC agreement with Joe, who will perform janitorial services. Acme assigns its rights under the contract to a neighbor in its building called Big Tech Inc. This means that Joe must perform the work for Big Tech instead of Acme. If Joe fails to do so, Big Tech can sue him for breach of contract.

An IC may also assign the benefits he or she receives under an IC agreement to someone else.

EXAMPLE: ABC Construction contracts to build a new house for Agnes. To help run its business, ABC borrows money from the Widows & Orphans Bank. As a condition for obtaining a \$100,000 loan, the bank requires ABC to assign to it the payments received from Agnes. This means Agnes must pay the Bank, not ABC.

"Delegation" is the flipside of assignment. Instead of transferring benefits under a contract, you transfer the duties. However, the person delegating duties under a contract usually remains responsible if the person to whom the delegation was made fails to perform.

EXAMPLE: Jimmy, a plumber, has contracted to provide Beta, Inc. with plumbing repair services. Because Jimmy is overloaded with work, he delegates to Mindy his duty to perform plumbing services for Beta. This means that Mindy, not Jimmy, will now do the work. But Jimmy remains liable to Beta if Mindy doesn't perform adequately.

a. Legal restrictions on assignment and delegation

Unless a contract provides otherwise, you can ordinarily freely assign and delegate it subject to some important legal limitations. The first limitation is concerned with fairness: You can't assign the benefit of your services to someone else without the IC's consent if it would increase the work the IC must do or otherwise magnify the IC's burdens under the contract. This restriction works both ways—the IC can't delegate his or her duties without your consent if it would decrease the benefits you would receive.

The most significant restrictions are those on delegation of duties. Here, the law protects you against an IC who tries to fob off his work onto someone else. An IC may not delegate his or her duties under the contract if it would materially alter the performance you contracted for. Specifically, ICs may not, without your consent, delegate contracts involving:

- personal services, including services by IC writers, artists and musicians and other services the performance of which is largely dependent upon an IC's unique abilities, taste, skills, personality or discretion, and
- contracts for professional services, such as those by lawyers, doctors or architects.

Service contracts with ICs involving more mechanical tasks ordinarily are delegable without the hiring firm's consent. For example, a contract to construct or paint a house would ordinarily be delegable. However, even in these cases, the IC can't delegate his or her duties to a person who lacks the skill or experience to complete the work satisfactorily.

EXAMPLE: Annie contracts with Frontier Construction to build her a log home. Frontier attempts to delegate its duty to construct the house to Davy, an unlicensed contractor who has never built a log home. Annie is legally entitled to object to this delegation and demand that Frontier do the work itself or delegate the work to a qualified log home builder.



b. How to handle assignment and delegation

You have several options for dealing with assignment and delegation in your agreement.

Option #1: Do nothing. You need not say anything about assignment and delegation in your agreement. Your agreement will be assignable or delegable subject to the restrictions noted above. This is the best option in most cases.

Option #2: Let it happen. If you absolutely do not care who does the work required by the agreement, choose Alternative A to allow an unrestricted right of assignment and delegation. Incidentally, this choice can help you if you are challenged on your treatment of the worker as an IC. It is strong evidence of an IC relationship because it shows you're only concerned with results, not who achieves them. It also demonstrates lack of control over the IC. Note, however, that if you include this clause in the agreement, the restrictions on assignment and delegation discussed above will not apply—that is, the IC will be able to delegate his or her duties even if they involve personal services.

Option #3: Retain control. There may be some situations in which you really don't want an IC to delegate his or her contractual duties without your consent. If you have hired a particular IC because of his or her special expertise, creativity, reputation for performance or financial stability, you may not want someone else performing the services, even if the person is technically qualified to do the work. In this event, choose Alternative B to prevent assignment or delegation by the IC under any circumstances without your written approval in advance. Unfortunately, requiring such approval tends to indicate an employment relationship, so don't include it in your agreement unless absolutely necessary.

23. Signatures

The end of the main body of the agreement should contain spaces for you to sign, write in your title and enter the date. There should also be space for the IC to sign and provide a taxpayer identification number.

The IRS requires anyone who hires an IC to obtain the person's taxpayer identification number and include it in every contract signed with the IC. This is either the IC's Social Security number or an employer identification number (EIN) obtained from the IRS. If the IC is a corporation, partnership or limited liability company, it will have an EIN, not a Social Security number.

Obtaining and listing the taxpayer identification number is not just a bureaucratic formality. It will become important if you hire an IC who is not a corporation or LLC and you or the IC are audited. If you don't have the number, the IRS will assume that the IC is not reporting or paying taxes on the income he or she receives from you. To make up this lost revenue, you'll be required to withhold 31% of all payments over \$599 you make to the IC and remit the money to the IRS.

Withholding some of the money earned by the IC and sending it to the IRS (not unlike employee withholding) is called backup withholding. If you fail to backup withhold, the IRS may impose an assessment against *you* equal to 31% of what you paid the IC. Backup withholding is not required if the IC is incorporated or an LLC. For a detailed discussion of backup withholding, see *Hiring Independent Contractors*, by Stephen Fishman (Nolo).

You don't need to worry about backup withholding if you have the IC list his or her taxpayer identification number in your IC agreement. Simply keep the agreement on file and you'll be able to prove to the IRS that you obtained the number. Another approach is to have the IC complete IRS Form W-9, Request for Taxpayer Identification Number and retain it in your files. You don't need to file it with the IRS. If you're audited, you can show the form to the auditor to prove you obtained the IC's ID number. Showing the auditor a signed contract containing the number will work just as well.

You can obtain Form W-9 directly off the IRS website at <http://www.irs.gov>.

Appendix: Independent Contractor Forms

- A. Independent Contractor Agreement
- B. Contract Amendment Form
- C. Independent Contractor Questionnaire
- D. Documentation Checklist
- E. Worker Classifications Factors Chart

INDEPENDENT CONTRACTOR AGREEMENT

This Agreement is made between _____ ("Client")
with a principal place of business at _____
and _____ ("Contractor")
with a principal place of business at _____

1. Services to Be Performed

(Check and complete applicable provision.)

☐ Contractor agrees to perform the following services: _____

OR:

☐ Contractor agrees to perform the services described in Exhibit A attached to this Agreement.

2. Payment

(Check and complete applicable provision.)

☐ In consideration for the services to be performed by Contractor, Client agrees to pay Contractor \$_____ according to the terms of payment set forth below.

OR:

☐ In consideration for the services to be performed by Contractor, Client agrees to pay Contractor at the rate of \$_____ per hour according to the terms of payment set forth below.

(Optional: Check if applicable.)

☐ Unless otherwise agreed upon in writing by Client, Client's maximum liability for all services performed during the term of this Agreement shall not exceed \$_____.

3. Terms of Payment

(Check and complete applicable provision.)

☐ Upon completion of Contractor's services under this Agreement, Contractor shall submit an invoice. Client shall pay Contractor the compensation described within _____ [15, 30, 45, 60] days after receiving Contractor's invoice.

OR:

☐ Contractor shall be paid \$_____ upon the signing of this Agreement and the remainder of the compensation described above upon completion of Contractor's services and submission of an invoice.

OR:

- ☐ Client shall pay Contractor according to the schedule of payments set forth in Exhibit ___ attached to this Agreement.

OR:

- ☐ Contractor shall invoice Client on a monthly basis for all hours worked pursuant to this Agreement during the preceding month. Invoices shall be submitted on Contractor's letterhead specifying an invoice number, the dates covered in the invoice, the hours expended and summarizing the work performed during the invoice period. Client shall pay Contractor's fee within _____ days after receiving Contractor's invoice.

4. Expenses

(Check and complete applicable provision.)

- ☐ Contractor shall be responsible for all expenses incurred while performing services under this Agreement. This includes license fees, memberships and dues; automobile and other travel expenses; meals and entertainment; insurance premiums; and all salary, expenses and other compensation paid to employees or contract personnel the Contractor hires to complete the work under this Agreement.

OR:

- ☐ Client shall reimburse Contractor for the following expenses that are directly attributable to work performed under this Agreement: _____.
- Contractor shall submit an itemized statement of Contractor's expenses. Client shall pay Contractor within 30 days after receipt of each statement.

5. Materials

Contractor will furnish all materials, tools and equipment used to provide the services required by this Agreement.

6. Independent Contractor Status

Contractor is an independent contractor, and neither Contractor nor Contractor's employees or contract personnel are, or shall be deemed, Client's employees. In its capacity as an independent contractor, Contractor agrees and represents, and Client agrees, as follows:

- Contractor has the right to perform services for others during the term of this Agreement.
- Contractor has the sole right to control and direct the means, manner and method by which the services required by this Agreement will be performed.
- Contractor has the right to perform the services required by this Agreement at any place or location and at such times as Contractor may determine.
- Contractor has the right to hire assistants as subcontractors, or to use employees to provide the services required by this Agreement.
- The services required by this Agreement shall be performed by Contractor, or Contractor's employees or contract personnel, and Client shall not hire, supervise or pay any assistants to help Contractor.

- Neither Contractor nor Contractor's employees or contract personnel shall receive any training from Client in the professional skills necessary to perform the services required by this Agreement.
- Neither Contractor nor Contractor's employees or contract personnel shall be required by Client to devote full time to the performance of the services required by this Agreement.

7. Permits and Licenses

Contractor has complied with all federal, state and local laws requiring business permits, certificates and licenses required to carry out the services to be performed under this Agreement.

8. State and Federal Taxes

Client will not:

- withhold FICA (Social Security and Medicare taxes) from Contractor's payments or make FICA payments on Contractor's behalf
- make state or federal unemployment compensation contributions on Contractor's behalf, or
- withhold state or federal income tax from Contractor's payments.

Contractor shall pay all taxes incurred while performing services under this Agreement—including all applicable income taxes and, if Contractor is not a corporation, self-employment (Social Security) taxes. Upon demand, Contractor shall provide Client with proof that such payments have been made.

9. Fringe Benefits

Contractor understands that neither Contractor nor Contractor's employees or contract personnel are eligible to participate in any employee pension, health, vacation pay, sick pay or other fringe benefit plan of Client.

10. Workers' Compensation

Client shall not obtain workers' compensation insurance on behalf of Contractor or Contractor's employees. If Contractor hires employees to perform any work under this Agreement, Contractor will cover them with workers' compensation insurance to the extent required by law and provide Client with a certificate of workers' compensation insurance before the employees begin the work.

(Optional: Check if applicable.)

- ☐ Contractor shall obtain workers' compensation insurance coverage for Contractor. Contractor shall provide Client with proof that such coverage has been obtained before starting work.

11. Unemployment Compensation

Client shall make no state or federal unemployment compensation payments on behalf of Contractor or Contractor's employees or contract personnel. Contractor will not be entitled to these benefits in connection with work performed under this Agreement.

12. Insurance

Client shall not provide any insurance coverage of any kind for Contractor or Contractor's employees or contract personnel. Contractor shall obtain and maintain a broad form Commercial General Liability Insurance policy providing for coverage of at least \$_____ for each occurrence. Before commencing any work, Contractor shall provide Client with proof of this insurance and with proof that Client has been made an additional insured under the policy.

Contractor shall indemnify and hold Client harmless from any loss or liability arising from performing services under this Agreement.

13. Term of Agreement

This agreement will become effective when signed by both parties and will terminate on the earlier of:

- the date Contractor completes the services required by this Agreement
- _____ [date], or
- the date a party terminates the Agreement, as provided below.

14. Terminating the Agreement

(Check and complete applicable provision.)

- ☐ With reasonable cause, either Client or Contractor may terminate this Agreement, effective immediately upon giving written notice.

Reasonable cause includes:

- a material violation of this Agreement, or
- any act exposing the other party to liability to others for personal injury or property damage.

OR:

- ☐ Either party may terminate this Agreement at any time by giving thirty days written notice to the other party of the intent to terminate.

15. Exclusive Agreement

This is the entire Agreement between Contractor and Client.

16. Modifying the Agreement (Optional: Check box if applicable.)

☐ This Agreement may be modified only by a writing signed by both parties.

17. Confidentiality (Optional: Check box and complete if applicable.)

☐ Contractor will not disclose or use, either during or after the term of this Agreement, any proprietary or confidential information of Client without Client's prior written permission except to the extent necessary to perform services on Client's behalf.

Proprietary or confidential information includes:

- the written, printed, graphic or electronically recorded materials furnished by Client for Contractor to use
- any written or tangible information stamped "confidential," "proprietary" or with a similar legend
- business plans, customer lists, operating procedures, trade secrets, design formulas, know-how and processes, computer programs and inventories, discoveries and improvements of any kind, and
- information belonging to customers and suppliers of Client about whom Contractor gained knowledge as a result of Contractor's services to Client.
- other: _____

Contractor shall not be restricted in using any material which is publicly available, already in Contractor's possession or known to Contractor without restriction, or which is rightfully obtained by Contractor from sources other than Client. Upon termination of Contractor's services to Client, or at Client's request, Contractor shall deliver to Client all materials in Contractor's possession relating to Client's business.

18. Resolving Disputes

(Choose Alternative A, B or C and any desired optional clauses.)

☐ ALTERNATIVE A

If a dispute arises under this Agreement, any party may take the matter to court.

☐ If any court action is necessary to enforce this Agreement, the prevailing party shall be entitled to reasonable attorney fees, costs and expenses in addition to any other relief to which he or she may be entitled.

☐ ALTERNATIVE B

If a dispute arises under this Agreement, the parties agree to first try to resolve the dispute with the help of a mutually agreed-upon mediator in _____ [list city or county where mediation will occur]. Any costs and fees other than attorney fees associated with the mediation shall be shared equally by the parties. If the dispute is not resolved within 30 days after it is referred to the mediator, any party may take the matter to court.

☐ If any court action is necessary to enforce this Agreement, the prevailing party shall be entitled to reasonable attorney fees, costs and expenses in addition to any other relief to which he or she may be entitled.

☐ ALTERNATIVE C



If a dispute arises under this Agreement, the parties agree to first try to resolve the dispute with the help of a mutually agreed-upon mediator in _____ [list city or county where mediation will occur]. Any costs and fees other than attorney fees associated with the mediation shall be shared equally by the parties. If it proves impossible to arrive at a mutually satisfactory solution through mediation, the parties agree to submit the dispute to a mutually agreed-upon arbitrator in _____ [list city or county where arbitration will occur]. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction to do so. Costs of arbitration, including attorney fees, will be allocated by the arbitrator.

19. Applicable Law

This Agreement will be governed by the laws of the State of _____.

20. Notices

All notices and other communications in connection with this Agreement shall be in writing and shall be considered given as follows:

- when delivered personally to the recipient's address as stated on this Agreement
- three days after being deposited in the United States mail, with postage prepaid to the recipient's address as stated on this Agreement, or
- when sent by fax or telex to the last fax or telex number of the recipient known to the person giving notice; such notice is effective upon receipt provided that a duplicate copy of the notice is promptly given by first class mail, or the recipient delivers a written confirmation of receipt.

21. No Partnership

This Agreement does not create a partnership relationship. Contractor does not have authority to enter into contracts on Client's behalf.

22. Assignment (Optional: Check box if applicable)

☐ Either Contractor or Client may assign its rights and may delegate its duties under this Agreement.

OR:

☐ Contractor may not assign or subcontract any rights or delegate any of its duties under this Agreement without Client's prior written approval.

Signatures

Client: _____
Name of Client

By: _____
Signature

Typed or Printed Name

Title: _____

Date: _____

Contractor: _____
Name of Contractor

By: _____
Signature

Typed or Printed Name

Title: _____

Taxpayer ID Number: _____

Date: _____



CONTRACT AMENDMENT FORM

This Amendment is made between _____ and _____
_____ to amend the Original Agreement titled _____,
signed by them on _____.

The Original Agreement is amended as follows:

All provisions of the Original Agreement, except as modified by this Amendment, remain in full force and effect and are reaffirmed. If there is any conflict between this Amendment and any provision of the Original Agreement, the provisions of this Amendment shall control.

Client: _____
Name of Client

By: _____
Signature

Typed or Printed Name

Title: _____

Date: _____

Consultant: _____
Name of Consultant

By: _____
Signature

Typed or Printed Name

Title: _____

Taxpayer ID Number: _____

Date: _____

INDEPENDENT CONTRACTOR QUESTIONNAIRE

Name: _____

Fictitious business name (if any): _____

Business address: _____

Business phone and fax #: _____

Employer Identification Number or Social Security Number: _____

Form of business entity (check one): ☐ Corporation ☐ Partnership ☐ Sole Proprietorship

1. Provide the name, address and dates of service of all companies for which you have performed services as an independent contractor for the past two years. But please do not provide any information you have a duty to keep confidential.
2. Have you ever hired employees? If yes, please complete the following:

Name of company: _____

Address: _____

Title: _____

Salary: _____ Dates of employment: _____

Name of company: _____

Address: _____

Title: _____

Salary: _____ Dates of employment: _____

Name of company: _____

Address: _____

Title: _____

Salary: _____ Dates of employment: _____

Name of company: _____

Address: _____

Title: _____

Salary: _____ Dates of employment: _____

3. Have you paid federal and state payroll taxes for your employees? ☐ Yes ☐ No

4. If you have hired employees, please provide the following:

Name of workers' compensation insurance carrier: _____

Workers' compensation policy number: _____

5. Do you hold a professional license? If so, please provide a copy.

6. Do you have a business license? If so, please provide a copy.

7. Describe the training you have received in your specialty:

School attended: _____

Dates of attendance: _____ Degrees received: _____

School attended: _____

Dates of attendance: _____ Degrees received: _____

School attended: _____

Dates of attendance: _____ Degrees received: _____

8. Do you advertise your services? ☐ Yes ☐ No

If so, please provide a copy of these advertisements, including a Yellow Pages listing.

9. If you don't advertise, how do you market your services?

10. Do you have a White Pages business phone listing? ☐ Yes ☐ No If so, please provide a copy.

11. Describe the business expenses you have paid in the past, including office or workplace rental, materials and equipment expenses, telephone and other expenses: _____

12. Describe the business expenses you pay now: _____

13. Describe the equipment and facilities you own: _____

14. Please describe the tools and materials you will use to perform the services in this job:

How much do they cost?: _____

15. Please list your general liability insurance carrier: _____

Policy number: _____

16. Please list your auto insurance carrier: _____

Policy number: _____

17. Have you ever worked for us before? If so, please complete the following:

Dates of employment: _____

Services performed: _____

18. Do you have an independent contractor agreement? If so, please attach a copy.

19. Do you have your own business cards, stationery and invoice forms? If so, provide copies.

20. If you're a sole proprietor, have you paid self-employment taxes on your income and filed a Schedule C with your federal tax return? ☐ Yes ☐ No

If so, will you provide copies of your tax returns for the past two years? ☐ Yes ☐ No

DOCUMENTATION CHECKLIST

Please provide the following documentation:

- ☐ copies of your business license and any professional licenses you have
- ☐ certificates showing that you have insurance, including general liability insurance and workers' compensation insurance if you have employees
- ☐ your business cards and stationery
- ☐ copies of any advertising you've done, such as a Yellow Pages listing
- ☐ a copy of your White Pages business phone listing, if there is one
- ☐ if you're operating under an assumed name, a copy of the fictitious business name statement
- ☐ a copy of your invoice form to be used for billing purposes
- ☐ a copy of any office lease and proof that you've paid the rent, such as copies of canceled rental checks
- ☐ the names and salaries of all assistants that you will use on the job
- ☐ the names and salaries of all assistants you have used on previous jobs for the past two years and proof that you paid them, such as copies of canceled checks or copies of payroll tax forms
- ☐ a list of all the equipment and materials you will use in performing the services and how much it costs; proof that you have paid for the equipment, such as copies of canceled checks, is very helpful
- ☐ the names and addresses of other clients or customers for whom you have performed services during the previous two years; but don't provide any information you have a duty to keep confidential
- ☐ if you're a sole proprietor and will agree, copies of your tax returns for the previous two years showing that you have filed a Schedule C, Profit or Loss From a Business.

WORKER CLASSIFICATION FACTORS CHART

The following chart lists which worker classification factors are considered by which agencies. Some states use more than one test and so may be listed twice. Others use different sets of factors and so are not listed here.

	IRS	Unemployment Compensation Agencies in states listed in footnote 1	Unemployment Compensation Agencies in states listed in footnote 2	Workers' Compensation Agencies in states listed in footnote 3	Workers' Compensation Agencies in states listed in footnote 4	U.S. Labor Department	Copyright Ownership
No training	•		•		•		
Assistants can do work	•		•		•		•
Worker can realize profit or loss	•		•		•	•	
Work not done on hiring firm premises	•		•		•		
No right to fire worker			•		•	•	
Worker offers services to public	•		•		•		
Worker furnishes tools and materials	•		•		•		
Payment by the project	•		•		•		•
Worker has multiple clients or customers			•		•		•
No continuing relationship with hiring firm			•		•	•	•
Worker has significant investment in equipment and facilities	•		•		•	•	
Worker pays own business expenses	•		•		•		
Worker has no right to quit			•		•		
Worker sets order or sequence of work	•		•		•		
Worker provides own training	•		•		•		

	IRS	Unemployment Compensation Agencies in states listed in footnote 1	Unemployment Compensation Agencies in states listed in footnote 2	Workers' Compensation Agencies in states listed in footnote 3	Workers' Compensation Agencies in states listed in footnote 4	U.S. Labor Department	Copyright Ownership
Worker need not perform services personally	•		•		•		
Worker sets own hours			•		•		•
Full-time work not required			•		•		
Reports not required	•		•		•		
Work outside hiring firm's usual business	•	•		•	•	•	•
Custom in the community			•		•		
Worker highly skilled			•		•		•
Initiative, judgment needed to succeed			•		•	•	
Parties' intent			•		•		
Worker not subject to hiring firm's control			•		•	•	
Worker has independent trade or business	•	•		•	•		•
Worker's tax treatment			•		•		•
Worker receives no employee benefits			•		•		•
Work typically not supervised			•		•		
No right to assign additional projects							•

¹Alaska, Arkansas, Connecticut, Georgia, Hawaii, Idaho, Indiana, Louisiana, Maine, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Rhode Island, Tennessee, Vermont, Washington, West Virginia, Wyoming.

²Alabama, Arizona, California, Delaware, Florida, Iowa, Kentucky, Minnesota, Mississippi, Missouri, New York, North Carolina, North Dakota, South Carolina, Texas, Utah.

³Alaska, Hawaii, Colorado, Mississippi, Missouri, New Jersey, North Dakota.

⁴Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wyoming.

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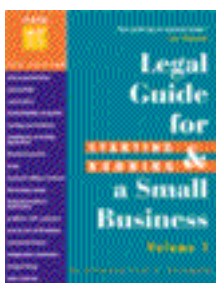
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